THE MORE THINGS CHANGE THE MORE THEY STAY THE SAME? THE *EVIDENCE ACTS* 1995 - AN OVERVIEW

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I. INTRODUCTION

A. The Acts - Their Scope and Operation

The Commonwealth and New South Wales Parliaments have this year enacted substantially similar *Evidence Acts* ("the Acts"). They are comprehensive restatements of the laws of evidence. The Commonwealth Act has been in operation since 18 April 1995. The New South Wales Act will operate in New South Wales courts as from 1 September 1995.

As to the Commonwealth Act, many will now be aware of its existence and its operation and, in particular, that it operates in federal courts and the courts of the Australian Capital Territory in hearings in those courts that commenced after 18 April 1995. More difficult is an understanding of the subtleties of s 8 of the Commonwealth Act, which is the primary provision spelling out the extent to which the Act operates as a code.

Prior to that Act coming into operation, federal courts applied Commonwealth evidence legislation and the laws of evidence (common law and statutory) of the State or Territory in which they happened to be sitting.[1] The new approach is that the Commonwealth Act prevails in proceedings in the relevant courts to the extent

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1 *Judiciary Act* 1903 (Cth) ss 79, 80, 80A.

that it is inconsistent with State and Territory laws of evidence. At the same time, existing Commonwealth statutes and regulations (but not court rules) will prevail if inconsistent with the Commonwealth Act. There are exceptions to these propositions contained in ss 8, 9, 10 and 11 of the Act but, from a practical point of view, it will not usually be necessary in dealing with evidentiary problems in the relevant courts to look beyond the statute for the answer.[2]

The New South Wales Act operates in New South Wales courts. Where it is inconsistent with other New South Wales statutes, the latter will prevail. Subject to qualifications similar to the Commonwealth Act[3] the New South Wales Act will override the common law rules of evidence where they are inconsistent or it is clear that the Act is intended to cover the field.[4] Specifically repealed are the *Evidence Act* 1898 (NSW) and the *Evidence (Reproductions) Act* 1967 (NSW).[5] As with the Commonwealth Act, it will not usually be necessary to look beyond the statute for the answer to any evidentiary problem.

The two Acts are identical in the overwhelming majority of provisions. One group of exceptions to this proposition comprise Commonwealth Act provisions concerning the special application of the Commonwealth Act to Commonwealth documents and the like.[6] In the New South Wales Act two provisions are included that do not appear in the Commonwealth Act; namely, s 194 dealing with the consequences of a witness failing to appear when called and s 196 which contains a procedure for dealing with offences against the Act and regulations.[7]

B. The Origins of the Acts

The Acts are the result of an exhaustive investigation by the Australian Law Reform Commission ("ALRC").[8] That investigation commenced in 1979 when the ALRC received a reference on the laws of evidence operating in federal and Territory courts from the Commonwealth government. The ALRC came to the conclusion that a statutory restatement was required for three principal reasons. Firstly, federal courts in administering national laws should not apply different laws of evidence selected according to the State or Territory in which they happen to be sitting. Secondly, there were significant deficiencies and uncertainties in all

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2 It will generally not be relevant to look to the common law and prior state statute law (and cases interpreting prior statutes) unless the previous law has not been changed or to do so would assist in understanding the changes that have been made or the terminology employed. The experience of the United States Federal Rules suggests that the Acts could become a 'pocket Bible' and the law, therefore, more accessible.

3 Sections 9, 10, 11.

4 For example, competence of witnesses is covered by s 12.

5 *Evidence (Consequential and other Provisions) Act* 1995 (NSW) s 3.

6 See for example ss 70(2), 154, 155, 163 and 182. There are other provisions of a technical nature.

7 Some minor differences are to be found in the definition of 'authorised person' for the purpose of swearing affidavits (s 171(3)) and the application of the privilege attaching to the reasons for decision of judge and jury in s 129(5)(a).

8 In doing so, it drew on a substantial body of published and unpublished work carried out by the New South Wales Law Reform Commission.

areas of the laws of evidence. Thirdly, the common law had not been able to address the deficiencies and uncertainties in the laws of evidence.[9]

In carrying out the task of formulating a statutory restatement, the ALRC made changes to the existing law only where it was satisfied that there were valid criticisms to be made. Elsewhere, it saw its task as that of removing uncertainties that existed in the laws of evidence.

The ALRC delivered its final recommendations in 1987.[10] In 1988, the New South Wales Law Reform Commission ("NSWLRC") published a report detailing its review of the ALRC proposals and recommending their adoption.[11] Since late 1987, there has been extensive government examination of the proposals involving principally the Commonwealth and New South Wales Governments. They undertook this task after the Standing Committee of Attorneys-General agreed in principle to support uniform evidence laws throughout Australia. The two Governments attempted to reach agreement on the terms of uniform legislation with the other States awaiting the outcome. Bills were subsequently introduced into the New South Wales Parliament in March 1991 and the Commonwealth Parliament in October 1991. Comment was sought and considered. After further consultation, and after consideration by the Senate Standing Committee on Legal and Constitutional Affairs, the legislation reached its present form and was passed.

C. The Challenge

Anyone studying the Acts will be forgiven for thinking that much is familiar. The language and concepts used will have a familiar ring to them. The Acts assume the continuation of the adversary system and its practices. They assume, for example, that, as in the past, it will be for the parties to invoke the rules except where the terms of the legislation indicate otherwise.[12] As in the past, objections to the admissibility of evidence will require consideration of the evidence sought to be adduced and not the questions asked. That having been said, the task facing persons trying to become completely familiar with the Acts is a daunting one. They face a comprehensive statutory restatement of the laws of evidence which introduces changes in most areas of the law.

The extent of the task has been brought home in the course of seminars conducted on the Acts. People have had difficulty determining where to start and how to go about understanding the Act. They have quickly reached a point of 'information overload'. As a result, though the relevant courts and many practitioners will have had to apply the Commonwealth Act for some months, I venture to suggest that they will still be finding their way in many areas.

The purpose of this article is to attempt to address these difficulties by providing an overview which will include suggestions about how to approach the Acts. To that end, the structure of the Acts and the underlying policy framework will be examined, as will the changes of approach and emphasis embodied in the

9 See general discussion in ALRC, Interim Report No 26, *Evidence* (1985) ch 4 and 5 and ALRC, Report No 38, *Evidence* (1987) ch 2.

10 ALRC, Report No 38, *Evidence* (1987).

11 NSWLRC, Report No 56, *Evidence* (1988).

12 For example Part 3.10, Div 3.

Acts. The article will also identify the major provisions and the major changes that they bring.

II. STRUCTURE OF THE ACTS

A. Pre-existing Law

By and large, the leading texts on the laws of evidence have not attempted a structured treatment of the subject. For example, the many rules of admissibility of evidence tend not to be dealt with as a coherent group of rules.[13] The treatment of the rules of evidence by courts and commentators gives the appearance of the existence of a miscellaneous collection of rules developed case by case and without any structure. The ALRC's view was that this was a reason for a lack of knowledge and understanding of the rules of evidence which it identified.[14]

B. General Structure of the Acts

A starting point for anyone wanting to become familiar with the Acts is to study their structure. The Acts attempt to simplify the law and to organise it in a rational and coherent way. This, it is hoped, will lead to a better understanding of the rules of evidence including the way they inter-relate. The Acts place the substantive rules in the three main parts outlined below.

(i) Chapter 2 - Adducing Evidence

In this Chapter are the rules affecting the adducing of evidence. The word 'adduced' is used in the Acts to cover both the leading of evidence in chief and in re-examination and the obtaining of evidence through cross-examination. The rules deal with the competence and compellability of witnesses, oaths and affirmations and the manner of giving oral evidence. Also included are rules relating to the manner of adducing evidence of the contents of documents and the use to be made of the 'view'.

(ii) Chapter 3 - Admissibility of Evidence

In this Chapter are the rules which affect the admissibility of the evidence that has been adduced in the manner permitted under Chapter 2. It commences with the relevance rules and then sets out the rules which exclude relevant evidence and exceptions to those rules.[15]

(iii) Chapter 4 - Proof

This Chapter contains provisions which bear on various aspects of proof, namely, the standard of proof, judicial notice, provisions facilitating the proof of certain facts, corroboration and like requirements.[16]

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13 See analysis in T Smith, "Evidence Reference, Progress Report" (1985-86) 10 *Adelaide Law Review* 102.

14 ALRC, Interim Report No 26, *Evidence* (1985) vol 1 at [213].

15 See Part VI below.

16 See Part VIII below.

The Acts conclude with a "Miscellaneous" Chapter - Chapter 5. It contains rules which did not fit easily into other chapters or which apply in relation to the other provisions in other chapters of the Act.[17] The Commonwealth Act includes rules making certain sections of the Act applicable to Commonwealth records in all proceedings in Australian courts. The Acts also include in this Chapter provisions dealing with inferences from documents and things, formal admissions by an accused person, the voir dire, waiver of rules of evidence, agreed facts and other matters.

The Acts have gone a long way towards a systematic treatment of the subject. They have followed to a large extent the structure recommended by the ALRC in its final report. They improve on the ALRC's structure by including the rules relating to the manner of proof of the contents of documents and 'views' in Chapter 2, which includes the rules relating to witnesses[18] and re-titling that chapter to cover the adducing of evidence generally. The change is consistent with the intention of the ALRC that the provisions of any legislation follow the order in which issues ordinarily arise in a typical trial from the moment a witness gets in the box to the conclusion of the evidence.

By becoming familiar with the structure of the Acts, people will be able to go quickly to the relevant chapter of the Acts once the evidentiary issue that has arisen has been characterised - either as something relating to the adducing of evidence, the admissibility evidence or aspects of proof.[19] It is also important in this overview, however, to direct attention to the structure of Chapter 3 dealing with rules of admissibility.

C. Rules of Admissibility - Structure

Perhaps the most important aspect of the structure of the Acts is that used for the rules relating to admissibility. So often, in practice, it is found that questions of admissibility are argued in a manner that ignores the following critical propositions:

- The primary rule of admissibility is that
  - (i) evidence that is relevant to the issues in a proceeding is admissible unless there is another rule to exclude it; and
  - (ii) evidence that is not so relevant is not admissible.
- The relevance of evidence to the issues in a proceeding is determined by considering the use to which it, if accepted, can logically be put and is sought to be put by the party adducing it.

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17 See Part IX below. There is also a provision denying the privilege against self-incrimination to bodies corporate.

18 The ALRC included provisions relating to the proof of the contents of documents in the Part dealing with various aspects of proof and the view provisions in the miscellaneous portion of the legislation.

19 Within the Acts they will also find that assistance is given by means of footnotes. Thus, for example, the Acts include a lengthy footnote to the hearsay rule which cross-refers to the various statutory exceptions to the rules.

- The other rules of admissibility, such as the hearsay and opinion rules, are rules which operate as exceptions to the general proposition that evidence that is relevant in the proceeding is admissible in the proceeding.

Chapter 3 of the Acts should make these propositions clear and cause those arguing admissibility points to direct their minds first to the use to which the evidence can logically be put and is sought to be put. Once such use is identified, its relevance can be determined and it will also be clear whether any and, if so, which of the subsequent exclusionary rules have any application, for the exclusionary rules in the Act generally are defined by reference to the purpose to which the evidence is sought to be put.

As to the exclusionary rules, they are best considered in succession. For example, the rules relating to admissions provide an exception to the preceding hearsay and opinion rules as do the rules dealing with evidence of convictions in civil proceedings.[20] Thus, a practical approach to any question of admissibility will be to commence with the relevant provisions and then work through the exclusionary rules, concluding with the exclusionary discretions if the evidence has not been excluded by a specific rule.

III. THE UNDERLYING POLICY FRAMEWORK

The Acts closely follow the ALRC proposals and those proposals reflected the policy framework adopted by it. This is a significant matter, for the interpretation of the provisions and their application should reflect those policies. The underlying policies will need to be borne in mind also when considering the statutory discretions[21] and the protections given to the parties where the common law rules of admissibility have been relaxed.[22]

The policy framework was discussed and described in both the interim and final reports of the ALRC.[23] It was there stated that the laws of evidence must serve the trial system. Thus, it was necessary to identify the nature and purposes of that system.

The civil trial was described as a method for the resolution of disputes between parties and serving the purposes of ordered society. To that end, it was said that it is necessary that the system not merely resolve disputes but that it do so in a way which is generally acceptable. To achieve its purposes, the ALRC concluded that the civil trial system

> must command the respect and confidence of parties and the community and that this will depend on at least the following.
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> (a) *Fact-finding.* Although a civil trial is not a 'search for truth', it is nonetheless of critical importance that the courts make a genuine attempt to find the facts. If this is not done, the system will be seen to be at best arbitrary and at worst biased

20 *Hollington v Hewthorn* [1943] KB 587. See also ss 110 and 111 dealing with character evidence.

21 For example ss 135-139.

22 For example ss 166-169.

23 Note 14 *supra* vol 1at [48]ff; note 10 *supra* at [30]ff.

and will lose the confidence and respect of the community. Any limitation on the attempt to find the facts requires justification.

(b) *Procedural fairness.* The parties must be given, and feel they have had, a fair hearing. This will depend in part on the extent to which they have been able to present their case - 'a litigant prevented from supporting his case, ...is bound to feel dissatisfied'. It will also depend upon the extent to which they have been able to challenge and meet the case presented against them. Again, limits require justification. ... The fairness of the proceeding will also depend on the conduct of the judicial officer - the more arbitrary or subjective it appears to be, the less acceptable to all concerned. It is also important that there be the appearance and, if possible, the reality of control by law rather than judicial whim. Detailed rules of evidence lend to the trial the appearance of proceedings controlled by the law, not by the individual trial judge's discretion, and reduce the scope for subjective decisions.

(c) *Expedition and cost.* The parties and the community will judge the civil trial system in part by considering its efficiency. Any rules or proposals must be evaluated in the light of their effect on the time and cost of the trial.

(d) *Quality of rules.* To the extent that the system operates under rules, the more anomalous, technical, rigid and obscure the rules seem, the more the system's acceptability is lessened. ... Any rules or proposals that are complicated, difficult to understand or apply, produce anomalies, lack flexibility where this is needed or are very technical, require justification.[24]

In relation to the criminal trial, the ALRC expressed the view that, like the civil trial, it involves an attempt to establish the facts and its credibility depends substantially on that attempt being a genuine one. Its credibility also depends on procedural fairness, efficiency and the quality of the rules. The ALRC took the view, however, that the nature and purpose of the criminal trial differs significantly from that of the civil trial. The following points were made:

(a) *Accusatorial system.* A criminal trial is not directed to resolving a dispute between parties. Although the Crown makes allegations and these are disputed by the accused, the trial is accusatorial and the accused is presumed innocent until proved guilty and traditionally is under no obligation to assist.

(b) *Minimising the risk* of *wrongful convictions.* The criminal trial traditionally has been seen to reflect the view that it is in the interest of the community that the risk of conviction of the innocent be minimised even if this may result in the acquittal from time to time of the guilty.

(c) *Definition of central question.* The central question in a criminal trial is whether the Crown has proved the guilt of the accused beyond reasonable doubt. The purpose of the criminal trial is not 'to find out if the accused is guilty'. The primary and specific object of the system is to be able to say with confidence

> ...that if there is a verdict of guilty there can be no doubt that the accused did what was charged with the requisite *mens rea.* (The Hon Justice RW Fox, "Expediency and Fact Finding in the Law of Evidence" in E Campbell and L Waller (eds), *Well and Truly Tried* (1982) p 153).

(d) *Recognition of rights of individual.*

> The convictions of 'guilty' persons are not to be pursued and obtained at virtually any cost. The conviction of the guilty is important...but...accused persons are entitled to the benefits of certain rights and protections as a matter of recognition of their personal dignity and integrity and also, on a far broader scale, as a measure of the overall fairness of the society to the individuals

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24 Note 10 *supra* at [34].

within it. (PA Sallmann, "The Criminal Trial on Trial" (1983) 16 *Australia & New Zealand Journal of Criminology* 31)

(e) *Assisting adversary contest.* It is also important to arm an accused person with some *protections* to give credibility, if not substance, to the idea of the adversary system as a genuine contest.[25]

The ALRC placed particular emphasis on the following well known principle:

> It is better that nine guilty men should escape than that one innocent man should be wrongly convicted.[26]

The impact of the recent miscarriages of justice in England on that community's confidence in the legal system again demonstrates the importance of this principle. The ALRC argued that this was a proper concern for a number of reasons including:

- the seriousness of the matters involved;
- the fallibility of the existing system, depending as it does upon human perception, memory, and recapitulation at all stages of the proceedings; and
- the imbalance of resources that generally exists in favour of the prosecution in the adversary trial of criminal offences.[27]

The ALRC's consultations revealed differences of view about the policy framework for criminal trials.[28] Some attention was focussed on the 'balance' struck between the prosecution and the accused. The ALRC did not set out to achieve a preconceived 'balance'. It was important, however, to assess the result achieved and this was done.[29] It will be important in the future to assess the impact of the departures in the Act from the ALRC proposals.[30]

(i) Unsworn Statements

The ALRC Bill included a modified right for accused persons to give unsworn evidence. The Acts do not do so. The Commonwealth Act does not do so, but permits that right to continue where it exists under State or Territory law. As the abolition of the right occurs at State and Territory level, the result is likely to be that a significant change will occur in the balance between the prosecution and the accused. The absence of the right may make it necessary, for example, to re-consider the question of drawing inferences from the failure of the accused to give evidence. While that may have been logical when an accused could give unsworn evidence, it may no longer be so when the court is ignorant of the reason for the accused's silence and the explanation for silence may lie, as it often did in the past, in the honest inadequacies of the accused as a witness.

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25 *Ibid* at [35].

26 Blackstone, *Commentaries on the Laws of England*, vol IV, p 27.

27 Note 10 *supra* at [35]. As to the latter point, the advantages of the prosecution were said in most cases to include the following:
the prosecution selects the charge (eg conspiracy); it has professional prosecutors who are usually more experienced than defence counsel; it usually has experienced witnesses; at the trial the accused is placed in the dock; and the preparation of the defence case is difficult where the accused is in custody. There are also usually fewer cost and time restrictions affecting the prosecution in its investigation and preparation.

28 Note 10 *supra* at [36]ff.

29 *Ibid* at [41].

30 The Commonwealth and New South Wales Governments are organising monitoring committees.

(ii) Admissions

The Acts exclude the ALRC proposal that the failure to caution a suspect should result in automatic exclusion of the resulting interview. They also exclude the more rigorous ALRC proposal for tape recording interviews, relying instead on the provisions of s 23V of the *Crimes Act* 1914 (Cth)[31] and a new s 424A of the *Crimes Act* 1900 (NSW).[32]

(iii) Identification Evidence

The Act omits the ALRC provision giving the trial judge the power to direct an acquittal.[33]

Important provisions remain, however, which, arguably confer advantages on the accused. They include limits on cross-examination of the accused (although less than the ALRC), the reversal of the onus of proof in the *Bunning v Cross* discretion,[34] and a third party confession exception to the hearsay rule. It will be important for those monitoring the Act to assess the impact of these and the other changes.

In conclusion, and at risk of oversimplifying the above policy statements, it may be said that the intention of the Acts is to enable parties to have their best available evidence admitted into evidence. This generally aids the fact finding process and enhances the fairness of the proceeding. Where to do so may adversely affect the fact finding process, cause unfair prejudice to another party, or be likely to add unduly to the time and cost of the proceedings, the Acts enable the court to exclude the evidence in question in appropriate cases. In addition, in criminal proceedings a more rigorous approach is intended in applying the Acts to evidence adduced by the prosecution because of the concern, in particular, to minimise the risk of wrongful conviction. The various specific rules have been drafted to strike the right balance between these considerations. There will be particular occasions, however, when they fail to do so. The Acts provide for such cases by the inclusion of exclusionary discretions[35] and by giving the courts the power to waive the rules in civil proceedings.[36]

IV. A CHANGE OF APPROACH - RELAXATION OF RULES

The Acts have abolished or relaxed a number of rules such as the 'best evidence rule', the rule against hearsay and the opinion rule. The Acts will, therefore, have the effect of moving the emphasis on occasions from questions of admissibility to questions of the weight of the evidence admitted. The abolition and relaxation of rules has been matched by two types of provision. The first contains residuary

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31 See Part VII(H) below.

32 *Evidence (Consequential and Other Provisions) Act* 1995 (NSW) Sch 1.

33 A power available in England and recognised in Tasmania and Western Australia: *R v Turnbull* [1976] 3 All ER 549; *McCusker v R* [1977] Tas SR 140; *Su Hon v R* [1978] WAR 94.

34 See Part VII(H) below.

35 Sections 135-139.

36 Section 120.

discretions to exclude evidence or limit its use.[37] The other contains provisions designed to protect parties against whom evidence may be admitted under the Act; evidence such as computer produced evidence, evidence in the form of copy documents and hearsay. A major concern was that any relaxation of the rules such as the hearsay rule, while enabling a party to lead the best evidence available to it, carried with it the risk of unfairness to the other party. In particular, without adequate notice, it may have difficulty addressing the evidence which will not be original evidence. To that end, notice provisions have been included together with provisions to strengthen the court's powers in relation to the discovery and inspection of documents (which are broadly defined) and the calling of witnesses and the production of documents by the party gaining the benefit of the relaxed rules of evidence. Thus, purely procedural powers have been added to work with the new rules that apply in the traditional areas of the laws of evidence.

V. CHANGES TO THE CONTENT OF THE LAW

Space does not permit an exhaustive discussion of the changes that have been made to existing laws of evidence. The majority of the changes in the Acts are those recommended by the ALRC in its reports and reference can be made to those reports for a detailed discussion of them.

Views will differ as to what constitute the major changes brought about by the legislation. Some may point to the abolition of the 'best evidence' rule or the modification of the hearsay rule. Others may point to the abolition of the law of corroboration and the substitution of a new regime. Others may point to the expansion of scope of judicial notice. The paragraphs that follow endeavour to identify important changes, focussing particularly on those areas of most practical significance.

VI. CHANGES TO RULES AFFECTING THE ADDUCING OF EVIDENCE

In Chapter 2 of the Acts, attention should be drawn to the creation of a secular test for the psychological competence of witnesses.[38] In addition, the compellability of members[39] of the family of a defendant in criminal proceedings is to be determined by the exercise of a guided discretion.[40] This discretion, while not found in most jurisdictions, exists, for example, in somewhat similar form in Victoria and South Australia. As to general rules relating to the giving of the evidence by witnesses, attention should be drawn to the fact that witnesses are given a prima facie right to give evidence through an interpreter.[41] A new regime

37 See Part VII(N) below.
38 Section 13, replacing the oath test.
39 Spouses, parents, children and de facto spouses.
40 Section 18.
41 Section 30, reversing the common law position.

is also provided to deal with witnesses who are called by a party and give evidence unfavourable to that party.[42] This replaces the limited hostile witness rule. As to the refreshing of memory in the witness box, a requirement that the document used to refresh the memory was made when the facts were 'fresh in the memory' replaces the common law requirement of contemporaneity. It is intended to be a different test, reflecting the fact that memory loss is dramatic in the first 24 hours following the event in question and that memory can be easily corrupted.[43] The rule in *Walker v Walker* is abolished[44] as is the so-called rule in *R v Jack*.[45] General control over cross-examination is provided.[46]

In addition, the judge can disallow leading questions in cross-examination.[47] The rule in *Browne v Dunn*[48] is addressed.[49] The relevant section does not expressly require that a party put its case to the other side's witnesses and does not empower the court to prevent the first mentioned party tendering evidence the substance of which was not so put.[50] It merely empowers the court to grant leave to the other party to recall witnesses to deal with matters raised by evidence adduced by the first mentioned party.

The best evidence rule is abolished and provisions are included spelling out the ways in which the contents of the documents may be adduced in evidence.[51] These provisions should be read in conjunction with the protections conferred by ss 166 to 169 (power to request the production of documents) and s 193 (powers of courts concerning discovery and inspection). Section 50 permits the court to direct evidence to be given in the form of a summary.[52] Finally, the view is also made part of the evidentiary material.[53]

VII. CHANGES TO THE RULES OF ADMISSIBILITY

Chapter 3 deals with the rules of admissibility. The Act contains a chart which shows the essential relationship of the provisions. The key provisions and the starting point for any discussion are the relevance provisions.

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42 Section 38.

43 See note 14 *supra* vol 1 at [615], [665]ff and [421] for relevant psychological research.

44 Section 35.

45 (1894) 15 LR (NSW) 196; note 14 *supra* vol 1 at [303]; in the Acts see s 45(5).

46 Section 41: "Misleading, unduly annoying, harassing, intimidating, offensive, oppressive or repetitive questions" are forbidden.

47 Section 42. This may surprise some, but it is the present law: *Mooney v James* [1949] VLR 22 at 27-8.

48 (1894) 6 R 67.

49 Section 46. Questions of appropriate comments and inferences to be drawn from a failure to put evidence to witnesses are not addressed by the legislation. Existing practices will provide guidance.

50 There being no specific rule of exclusion in Chapter 3, the court can not prevent the evidence being adduced unless an exclusionary discretion is applicable.

51 Section 51.

52 This was not an ALRC provision. Its value may be limited in that the rules of admissibility in Chapter 3 must still be satisfied. Summaries not admissible might still be used as aids to understanding the evidence.

53 Section 54.

A. Relevance

The relevance provisions are contained in Part 3.1. Relevant evidence is defined in s 55(1) as 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.

To avoid argument s 55(2) goes on to provide that evidence is not to be taken to be irrelevant only because it relates to the credibility of a witness, the admissibility of other evidence, or a failure to adduce evidence.[54]

Section 56 then sets out the primary rule of admissibility:

> (1) Except as otherwise provided by this Act, evidence that is relevant in the proceeding is admissible in the proceeding.
> (2) Evidence that is not relevant in the proceeding is not admissible.

What is most significant in these proposals is not immediately apparent to the reader of the Acts. The ALRC recommended that the legislation give effect to the common law requirement that evidence have sufficient relevance to be admissible[55] and that it do so by the technique employed in the United States Federal Rules 1975[56] of

- formulating the definition of relevant evidence in terms of a bare potential to rationally affect the assessment of the probabilities; and
- articulating the discretion inherent in the requirement of sufficient relevance.

The first objective is met by s 55(1), above, and the second by s 135. Section 135 provides:

> The Court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:
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> (a) be unfairly prejudicial to a party; or
> (b) be misleading or confusing; or
> (c) cause or result in undue waste of time.

Thus, what has been an intuitive and rarely articulated process of determining whether a piece of evidence was sufficiently relevant will be determined by the application of the above two provisions.[57] If evidence is adduced which could rationally affect indirectly the assessment of the probability of the existence of a fact in issue in the proceeding, a court may refuse to admit the evidence if, for example, its probative value is slight and is substantially outweighed by the danger that it might result in an undue waste of time. As lack of relevance is the most frequent objection taken in trials, judges and practitioners are likely to become very familiar with these provisions. The s 135 discretion is also likely to serve another function. It is available for use along with the other exclusionary discretions, where the specific rules of admissibility, such as the hearsay rule, fail

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54 The definition of what constitutes relevant evidence does not so much constitute change as provide a statement which rationalises several different approaches or tests used in the texts and the cases identified by the ALRC's research: see note 14 *supra* vol 2, Appendix C at [55].

55 See *R v Stephenson* (1976) VR 376 at 381.

56 Rules 401-403.

57 Sections 55(1) and 135.

in particular cases to strike the balance intended by the Acts. The American experience of the same discretion suggests that this use will be made.

B. Provisional Relevance

Another important provision is the provision dealing with provisional relevance. The legislation has to deal with the problem that the capacity of a piece of evidence to affect the probabilities (its relevance) may depend upon the acceptance of other evidence - for example,

- the relevance in murder proceedings of real evidence such as the alleged murder weapon depending upon the acceptance of evidence about the fatal wound being consistent with the use of that weapon; or
- the relevance of a document or a transcript of a tape-recording depending on the acceptance of evidence of its authentication.[58]

The basis upon which such evidence is led is discussed in American writing.[59] The Acts adopt the approach of the United States Federal Rules of treating evidence of authentication and identification as an aspect of relevance. Such evidence is treated as provisionally relevant, because the question of authentication or identity is one to be finally determined by the tribunal of fact and, if the tribunal of fact rejects that evidence, the provisionally relevant evidence will cease to be relevant. In addition, the relevance of evidence may depend upon the acceptance of evidence yet to be adduced. Because the relevance of such evidence will depend ultimately on the findings of the tribunal of fact, the standard of proof to be satisfied before making the finding that establishes the provisional relevance of a piece of evidence is whether the finding 'is reasonably open'.

C. Inferences Relevant to Relevance

At common law, extraneous evidence is required to authenticate documents and things. It must be sufficient to prove that the document or thing is what it purports to be before inferences can be drawn from the document or thing that it is what it purports to be. Section 58(1) abolishes this 'agnosticism'.[60] The section provides:

> 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.

This provision introduces a relaxation of the common law. The common law approach, of course, provides protections to the party against whom the document is led, but such protections are only needed in the case of documents or things which are in dispute. Alternative protection is given under the Acts by the provisions enabling a party to request the production of a document[61] and those increasing powers of discovery and inspection.[62]

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58 Or the relevance of the evidence of the behaviour of a tracker dog depending upon the acceptance of evidence about the reliability of such behaviour: *R v Pieterson* [1995] 1 WLR 293.

59 Note 14 *supra* vol 1 at [979]ff.

60 CT McCormick, *Cases and Materials on The Law of Evidence*, West Publishing (3rd ed, 1956) p 388.

61 Section 166ff.

62 Section 193.

I turn then to the provisions dealing with the first rule of exclusion - the hearsay rule. As these provisions are to be the subject of a detailed article in this Journal, I will confine my comments to the overall approach taken and the structure of the provisions.

D. Hearsay - The Policy Framework

The Acts contain a rule excluding hearsay evidence and exceptions to that rule. This was the recommendation of the ALRC. It rejected the view that the hearsay rule should be abandoned and all hearsay evidence dealt with simply on the basis of the weight to be attached to it. It stated:

> While most of the arguments supporting the exclusion of hearsay evidence must be qualified there is much force in them. As a general proposition hearsay evidence is a category of evidence that should be regarded as significantly unreliable and for that reason warranting a special treatment. Its poor quality may adversely affect the fact-finding of the courts. In addition it carries with it the other disadvantages referred to above - the danger that the party against whom the evidence is led will not have a fair trial, the danger of adding to the time and cost of litigation, and the dangers of fabrication and surprise. ... While the rule against hearsay evidence may be strongly criticised for having an adverse effect on the fact finding process, on the appearance of fairness and on the time and cost of litigation, its relaxation can give rise to similar disadvantages. In the area of hearsay evidence the policy objectives outlined earlier in this report both support each other and come into conflict. Whatever the proposal advanced, it will have a potential positive and negative impact on the fact finding process, the fairness of the trial and its cost.[63]

The hearsay provisions of the Acts follow very closely the provisions contained in the draft Bill produced by the ALRC. The hearsay provisions were based upon the general policy framework and the specific policy considerations identified within that framework. The latter considerations are summarised in the final report as follows:

(a) *Best available evidence.* The starting point used in framing the interim proposals was the proposition that the 'best evidence available' to a party should be received. This will assist the parties to present all relevant evidence and give the court the competing versions of the facts. In so doing, the appearance and reality of the fact finding exercise will, on balance, be enhanced and so will the fairness of the trial process. The concept of 'best available evidence' involves two elements - the quality of the evidence and availability. The quality of hearsay evidence will vary considerably. Categories of hearsay evidence, however, were isolated for the purposes of the proposal.

- *Remote hearsay.* The distinction was drawn between first hand and more remote hearsay. The view taken was that second hand hearsay is generally so unreliable that it should be inadmissible except where some guarantees of reliability can be shown together with a need for its admissibility. This view is supported by psychological research. (ALRC 26, vol I, para 664ff.) Another reason for the distinction is that second hand and more remote hearsay is generally of no value to the party seeking to call it and would, if admitted, add to the cost and time of proceedings. It will be impossible to assess its weight in most cases.
- *'Contemporaneous' first hand hearsay.* A distinction was drawn between statements made during or shortly after the events to which they refer and

63 Note 14 *supra* vol 1 at [675].

later statements. Experience suggests that the account of an event given shortly after the event will be more accurate than one given months or years after the event. (See *Constantinou v Frederick Hotels Ltd* [1966] 1 WLR 75, 78 (Lord Denning)). Psychological research, however, suggests that loss of memory is more dramatic than we realise and that we underestimate the extent to which the memory is affected by a variety of distorting factors over time. (ALRC 26, vol I, para 665-6). Evidence of a statement made shortly after the event is likely to be the best available evidence and any exceptions drawn should recognise this.

The element of availability, however, raises at least two issues. First, where the eyewitness has died, become too ill to testify or can not be found, his out of court statement will be the best evidence available of what he saw. Secondly, the availability of evidence in a practical sense depends upon the difficulty of producing it to the court. What is the best available evidence may depend upon a balancing of the importance and quality of evidence against the difficulty of producing it.

(b) *Criminal trials - a qualification.* A major qualification to the above approach was made for the criminal trial. The concern to minimise wrongful convictions requires a more cautious approach to the admission of hearsay evidence against an accused. Where the maker is unavailable, some guarantees of trustworthiness should be required (as at present in some common law and statutory exceptions) before hearsay evidence is admissible against an accused. That same concern, however, reinforces the desirability of an approach without such limitations for evidence led by the accused. In addition, the cost of producing available direct evidence for the prosecution should be regarded as an issue of minimal significance. The accused is entitled to confront those who accuse him and expect that he will not be convicted on hearsay evidence where the relevant witness is available.[64]

The Interim Report drew attention to the fact that, where reform will lead to an increase in the hearsay evidence admissible in trials, it will carry with it the risk that parties may be caught by surprise and the risk of evidence being fabricated. In such situations consideration must be given to appropriate safeguards to minimise surprise and the probability of fabrication and enable the party against whom it is led to investigate the evidence, meet it and test it, whether by cross-examination or other means. In addition, any relaxation of the hearsay rule will have cost implications. While the relaxation of the rule can result in cost savings, it can result in more evidence being led and collateral issues being raised. A cautious approach to relaxation is warranted and the benefits of any proposal must be compared with the likely addition to the time and cost of litigation.

E. Structure of the Hearsay Provisions

As a result of the above considerations, a distinction is drawn between first hand hearsay[65] and more remote hearsay (which is given specific treatment). The provisions for the latter include s 69 dealing with business records. It is a simplified version of the previous Commonwealth and New South Wales statutory

64 Note 10 *supra* at [139]-[140].

65 That is, evidence of a previous representation that was made otherwise than in evidence in the proceeding by a person who had personal knowledge of the facts asserted in it and given by a person who saw, heard or otherwise perceived the representation being made or that is contained in a document: see the Dictionary and ss 62, 63, 64, 65 and 66.

provisions. Sections 70 to 74 deal with tags and labels, telecommunications and reputation evidence as to relationships, age, public and general rights and other matters. Reliability and necessity justify such exceptions.

In the case of 'first hand' hearsay, there are different provisions depending on whether the proceedings concerned are civil or criminal. In seeking to secure a higher degree of reliability for evidence led by the prosecution in criminal trials, the ALRC distilled from the myriad of common law exceptions the matters which had been identified at common law as factors that have the potential to add to the reliability of hearsay evidence. The effect of the provisions for first hand hearsay were summed up by the ALRC as follows:

> In civil proceedings, where first hand hearsay evidence was the best evidence that a party had available to it or the cost of calling direct evidence was not warranted, it was proposed that the exclusionary rule should not apply.
>
> (a) *Maker unavailable.* It was proposed that where the person who made the out of court representation was not available to give evidence, the hearsay rule should not exclude evidence of that representation if notice had been given to the other party.
>
> (b) *Maker available.* It was proposed that where the maker of the representation was available, hearsay evidence could be admitted without calling the maker if notice was given and no objection was taken, or if the court granted leave. Where the maker was called as a witness, the hearsay evidence should be limited to evidence of representations made at or about the time of the event to which they related. Where notice was required, it was proposed that it should include notice of all other relevant representations. The court should be able to relieve the parties of the consequences of non-compliance with the notice requirements. ...

A similar structure was proposed for criminal proceedings.

> (a) *Maker unavailable.* In general, the accused should be able to have first hand hearsay evidence admitted when it was the best evidence he or she had available. Thus, where the maker of the representation was not available, the hearsay rule should not exclude the evidence provided notice was given. The hearsay rule should not be relaxed in favour of the prosecution, however, unless specified guarantees of reliability were met: the person who made it was under a duty to make it; it was made at or about the time of the event to which it relates; it was made in the course of giving sworn evidence that was open to cross-examination by the accused; or it was against the interests of the person who made it.
>
> (b) *Maker available.* Where the maker was available, he or she should be called, and only statements made at or about the time of the events concerned could be admitted. Proofs of evidence, however, were not rendered admissible under the exception, although evidence relevant to identification was.[66]

The proposal for first hand hearsay may not at first sight seem simple, but compared to existing law it represents a significant simplification. In practice, the proposal should be reasonably simple to apply. The provisions to be applied will be found by first asking whether the hearsay is first hand or more remote. The answer to that question determines the applicable provisions of the Acts.

(i) First Hand Hearsay (ss 62 to 68)

It is necessary to identify one out of four sections in deciding the admissibility of the evidence. That section would be found by asking the following questions:

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66 Note 10 *supra* at [127]-[128].

- is the trial a civil trial (ss 63 and 64) or a criminal trial (ss 65 and 66); and
- is the maker of the statement available or not?

(ii) More Remote Hearsay (ss 69 to 74)

If the hearsay is not first hand, its admissibility will depend on whether it comes within the categories of business records, reputation evidence or other categories of exceptions.

Notice provisions for first hand hearsay are contained in ss 67 and 68.[67]

The sections dealing with the hearsay rule significantly relax the previous law. It must be remembered, however, that residuary discretions are available to be used in appropriate cases should the application of the hearsay provisions not achieve the result intended by the Acts. They may be invoked when the admission of the evidence will unfairly prejudice a party[68] or mislead or confuse or cause or result in undue waste of time.[69] There is also a discretion conferred by s 136 of the Acts to limit the use that can be made of the evidence if a particular use might be unfairly prejudicial to a party or mislead or confuse. An additional protection is found in s 107. It provides an exception to the rule excluding credibility evidence in relation to evidence relevant to the credibility of a person who made a previous representation where evidence of that representation has been admitted into evidence because of the operation of the hearsay provisions.[70] The party against whom the hearsay evidence is led can also call in aid the protection given by ss 166 to 169, to which reference has already been made. He or she can also seek a warning from the trial judge in a jury trial.[71]

F. The Opinion Rule

After imposing a rule of exclusion for opinion evidence,[72] again expressed in terms of the use sought to be made of the evidence, the Acts provide a rule similar to that for hearsay evidence which lifts the opinion rule embargo where evidence of opinion is relevant for a purpose other than proving the existence of the fact as to which the opinion was expressed.[73] There are then two exceptions.

(i) Lay Opinion

Non-expert evidence is permitted by s 78 where it is based on what the person concerned "saw, heard or otherwise perceived about a matter or event" and it is necessary to receive evidence of opinion "to obtain an adequate account or understanding of the person's perception of the matter or event".

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67 See also *Evidence Regulations* 1995 reg 5; cf *Civil Evidence Act* 1968 (UK).

68 Section 135 (all trials - must substantially outweigh) and s 137 (criminal trials, where led by the prosecution).

69 Section 135 - all trials.

70 See also s 108(2).

71 Section 165.

72 Section 76.

73 Section 77. The hearsay provision is s 60; it lifts the hearsay rule, for example, for prior inconsistent statements.

This provision may be said to encapsulate the better approach that has developed over the years in receiving what may be called lay opinion evidence.

(ii) Expert Opinion

Section 79 dealing with expert opinion evidence may be thought at first sight to be unexceptional. It is in the following terms:

> 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.

The provision is important, however, because it rejects the line of authority which suggests that experience alone can not be enough and that a special study or training must be demonstrated before an expert can give opinion evidence.[74]

The next section is more dramatic. Section 80 abolishes the ultimate issue rule and the rule excluding opinion evidence on matters of common knowledge.[75] These rules have become so uncertain as to create considerable difficulty. They were developed to deal with the perceived problem of opinion evidence that might mislead or cause unfair prejudice or waste time. On the few occasions when such concerns may fairly arise, discretions to which reference has already been made can be invoked.

Finally, it should be noted that where the basis of the expert's opinion is representations of fact made by others, evidence of those representations is relevant to prove the basis of the opinion. As a result, it may also be used to prove the facts asserted notwithstanding the hearsay rule.[76]

G. Admissions

The Acts provide an exception to the hearsay and opinion rules for admissions. Admission is defined to mean a previous representation made by a person who is or becomes a party to a proceeding that is adverse to the person's interests in the outcome of the proceeding. Thus, it is not necessary that the admission be adverse to the person's interest at the time it was made. The exception to the hearsay rule is confined to first hand evidence of the admission.[77]

Section 87 deals with vicarious admissions. It provides that evidence of a previous representation is to be admitted in evidence as an admission by a party where "it is reasonably open to find" that the person who made the representation had the requisite authority[78] to make the statements on behalf of the party.

The test of 'reasonably open to find'[79] is used because the evidentiary facts to be established to enable the evidence to be received are facts which the tribunal of fact will often itself have to determine at the end of the trial.

Section 87(2) provides a major change in that it allows the hearsay rule to be lifted for the purpose of determining whether an admission was made with the

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74 Note 14 *supra* vol 2, Appendix C at [97].
75 *Ibid* at [101]ff.
76 Section 60.
77 See ss 81-83 and the Dictionary.
78 Defined in some detail in the section.
79 Sections 87(1) and 88.

authority of or within the employment of the party. As a result, any statement made by the person making the representation as to his or her relevant authority or employment will not be excluded by the hearsay rule if tendered for the purpose of determining whether that person had the requisite authority or employment. The exclusionary discretions will be available.

The effect of these provisions will be, in many cases, to permit evidence of representations made by employees of defendants to be received which would not at present be received and thus to shift the evidentiary onus. The party against whom the evidence is led will usually be best placed to give evidence on the issue.

H. Admissions by the Accused

In most States and Territories, the common law voluntariness rule applies without limitation, as does the discretion to exclude evidence of admissions unfairly obtained - the *Lee* discretion. In the Australian Capital Territory, the voluntariness rule had been modified in relation to threats, promises and inducements held out to or imposed upon the person making the admission. There the admission was, by reason only of that fact, to be excluded unless a positive finding could be made that they were unlikely to cause an untrue admission of guilt.[80] In Victoria, a somewhat similar provision exists but the onus is different - the evidence will not be excluded unless the judge is satisfied that the threat or promise was likely to cause an untrue admission of guilt.[81]

The Acts retain the *Lee* discretion and set out a new regime of rules in place of the voluntariness rules. The ALRC was of the view that the voluntariness rule had ceased to adequately address the purposes it was intended to serve.[82]

It must be borne in mind that these provisions will apply in the Australian Capital Territory in the context of the *Crimes (Investigation of Commonwealth Offences) Amendment Act* 1991 which lays down a regime for the recording of interviews. That Act applies to federal offences and to offences in the Australian Capital Territory which carry a penalty of imprisonment of more than 12 months.[83] In New South Wales, a similar regime is found in s 424A of the *Crimes Act* 1900.[84] It must be said, however, that such provisions in combination with ss 84 to 86 of the Acts provide a regime that is not as rigorous as that which was put forward by the ALRC.[85] Their impact will need to be closely monitored. The provisions are outlined below.

(i) Violent Conduct

The first relevant provision is s 84. It applies in both civil and criminal proceedings. It provides that evidence of an admission is not admissible unless the court is satisfied that the admission and the making of the admission was not influenced by violent, oppressive, inhuman or degrading conduct or threats of such

80 *Evidence Act* 1971 (ACT) s 68.
81 *Evidence Act* 1958 (Vic) s 149.
82 Note 14 *supra* vol 1at [371]ff.
83 See *Crimes Act* (Cth) s 23A(6).
84 *Evidence (Consequential and Other Provisions) Act* 1995 (NSW) Sch 1.
85 Note 10 *supra* at [152]ff.

conduct. The conduct or threats may be directed towards the defendant or another person. The provision will only have to be considered, however, if the defendant adduces evidence to raise the issue.

(ii) Other Conduct

The next section, s 85, applies only in criminal proceedings and applies to admissions made by a defendant in two situations - in the course of official questioning or as a result of an act of another person who is "capable of influencing a decision whether a prosecution of a defendant should be brought or should be continued". The section then provides that evidence of such an admission is not admissible "unless the circumstances in which it was made were such as to make it unlikely that the truth of the admission was adversely affected." This places the burden on the prosecution, where the preliminary facts are satisfied, to persuade the trial judge that the circumstances in which the admission was made were unlikely to adversely affect the truth of the admission.[86]

(iii) Unsigned Record of Interview

Section 86 excludes a document prepared by an investigating official[87] containing the contents of questions and answers unless the person questioned has acknowledged by signing, initialling or otherwise marking the document that the document is a true record.

(iv) Bunning v Cross Restated

A further control of admissions (and, of course, other evidence) is found in the restatement of the *Bunning v Cross* discretion.[88] Section 138(1) provides that evidence that was obtained improperly or in contravention of an Australian law or in consequence of such conduct is not to be admitted "unless the desirability of admitting the evidence outweighs the undesirability of admitting the evidence that has been obtained in the way in which the evidence was obtained."

This discretion applies in both civil and criminal proceedings. Significantly, this provision places the onus on the party adducing evidence to persuade the court that the evidence should be admitted where an impropriety or contravention is established. The common law discretion places the onus on the party against whom the evidence is adduced - usually the defendant. Subsection (2) requires a finding to be made of impropriety in obtaining evidence of an admission made during the course of questioning, and evidence obtained in consequence of that admission, 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 that act or omission was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning; or

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86 It is assumed that the defendant must raise the issue for consideration of the court, although the defendant is not obliged to adduce evidence to raise the issue: cf s 84.

87 See Dictionary.

88 (1978) 141 CLR 54.

(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.

Section 139 is important. It provides that evidence of a statement made or an act done by a person during questioning is taken to have been obtained improperly for the purpose of s 138(1) if the person was under arrest[89] for an offence at the time, the questioning was conducted by an investigating official with power to arrest the person and that official failed to caution the person in the ordinary way.[90] It also provides for similar consequences where the questioning is conducted by an investigating official who does not have power to arrest but has formed a belief that there is sufficient evidence to establish that the person had committed an offence.[91]

(v) No Adverse Inference from Silence

Finally, s 89 prevents the drawing of inferences adverse to an accused person from the failure or refusal of a person to answer one or more questions or to respond to a representation made in the course of official questioning. An exception is provided where the evidence is relevant to prove a fact in issue - for example, where it may be an offence to refuse to answer a question. The inferences forbidden include an inference of consciousness of guilt and any inference relevant to a party's credibility. Until the decision of the High Court in *Petty and Maiden v R* this provision would have modified the common law.[92] Following that decision, it may be said that this provision reflects the common law.

I. *Hollington v Hewthorn*

The rule in *Hollington v Hewthorn* prevents the admission of evidence of prior convictions in respect of conduct in issue in civil proceedings.[93] It has been much criticised. To admit such evidence, however, has its danger. To properly assess the evidence, it will, on occasions, be necessary to receive substantial evidence about what occurred at the trial below. Nonetheless, in many cases there will be no issue about what occurred at the previous trial and the evidence may be highly probative. Part 3.5 abolishes the rule.[94] It must be borne in mind, as with all other rules providing exceptions to the exclusionary rules and thus allowing for greater admissibility, that the residual discretion contained in s 135 to exclude the evidence is available. The power to require the calling of witnesses and other evidence is also available to the party against whom the evidence of the conviction is led.[95]

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89 Subsection (6) contains an inclusive statement defining the concept of the person 'being under arrest'.
90 Section 139(1).
91 Subsection (2).
92 (1991) 173 CLR 95.
93 [1943] KB 587.
94 In particular, s 92(2).
95 Sections 166-169.

J. Character and Conduct Evidence

Part 3.6 of the Acts deals with evidence of previous character, reputation, prior conduct and tendencies where that evidence is relevant to the facts in issue in the case.[96] It provides a regime to deal with what is commonly known as similar fact evidence and does so for both civil and criminal cases. Part 3.6 does not apply to evidence relevant only to the credibility of a witness.[97] Part 3.7 applies in that situation. Part 3.8 applies only to criminal cases and addresses character evidence led for and against an accused.

(i) Part 3.6 - Tendency and Coincidence Evidence

Two rules are provided. At present, no agreed common law rules exist for civil trials, and those for criminal trials have been unclear. The new rules are the tendency rule and the coincidence rule, set out in ss 97 and 98 respectively.

The ALRC's analysis of the existing law identified two possible lines of reasoning when evidence is adduced of prior conduct.[98] One depends upon whether it is established that a person is shown to have been responsible for earlier similar conduct and thus revealed a tendency to engage in such conduct.[99] The second arises where a pattern of conduct is shown and it is sought to prove from that pattern of conduct that a person was, for example, responsible for the act in question or that the conduct was not accidental.[100] In the second situation, what is being used is a reasoning process based on the improbability of the coincidence.

The two rules may be briefly summed up, although the statement of the rules themselves is lengthy. Evidence of character, reputation or of a person's conduct or tendency and evidence of two or more related events[101] is not admissible to prove that person's tendencies or that a person did an act or had a particular state of mind unless:

- the party adducing the evidence gives reasonable notice in writing[102] to each other party of its intention to adduce the evidence; and
- the court is satisfied that the evidence has significant probative value.

It would seem from the way the provisions are drafted that the onus will be on the party against whom the evidence is adduced to satisfy the trial judge that reasonable notice in writing was not given or that the evidence did not have significant probative value.

Because of the potentially unfairly prejudicial effect of such evidence in criminal proceedings there is an additional provision, s 101, applying to such proceedings. It applies to such evidence when adduced by the prosecution. The

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96 But not a fact in issue in the case: s 94(3).

97 Section 94(1).

98 Note 14 *supra* vol 1 at [600]ff, [790]ff.

99 For example *R v Straffen* (1952) 2 QB 911.

100 For example *Martin v Osborne* (1936) 55 CLR 367.

101 'Related events' are defined to be "substantially and relevantly similar events occurring in substantially similar circumstances". Thus, there is no rule covering such evidence where those criteria are not satisfied, which, on the face of it, should be excluded. One wonders if this was intended. Control of such evidence will depend on ss 101, 135 and 137. The ALRC provisions were different.

102 See s 99 for requirements; notice can be dispensed with: s 100.

High Court has advanced a number of different formulae to deal with the problem of such evidence when adduced in criminal proceedings.[103] The formula selected in the Acts is contained in s 101(2) which provides:

> Tendency evidence about a defendant or coincidence evidence about a defendant, that is adduced by the prosecution, can not be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant.

Finally, exceptions are provided to the application of the above rules where the tendency evidence or coincidence evidence is 'adduced' to explain or contradict tendency or coincidence evidence already adduced by another party.[104] Strictly interpreted, the sections do not require that the evidence, sought to be explained or contradicted, have been admitted into evidence but it must be tendered for the above purpose and would not be relevant unless the other evidence had been admitted or was foreshadowed.[105] In relation to such evidence, the residuary discretions in ss 135, 136 and 137 remain.

(ii) Part 3.7 - Evidence Relevant to Credibility

This Part of the Acts deals with evidence that is relevant only to a witness' credibility. It is controlled by a primary rule of exclusion.[106] Exceptions are provided, firstly by rules that operate during cross-examination, then by rules that deal with rebuttal evidence and rules that operate during re-examination.

As to the first group of exceptions, the exclusionary rule is lifted "if the evidence has substantial probative value".[107] On the face of it, this provision would enable a trial judge to exercise more control over credibility cross-examination than is possible under the common law.

As to rebuttal evidence,[108] the Acts will change the common law which limits the evidence that may be adduced to rebut denials in cross-examination of matters put to a witness that are relevant to credibility only.[109] The section widens, cautiously, the classes of rebuttal evidence that are allowable. They include evidence tending to prove that the witness knowingly or recklessly made a false representation while under an obligation to tell the truth imposed by law[110] and evidence that a person was unable to be aware of matters to which his or her evidence relates.[111] Such rebuttal evidence may be adduced from other witnesses, but only if the witness whose credibility is under attack has had the allegation put to him or her and has denied it.

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103 See note 14 *supra* vol 2, Appendix C at [169]; note 10 *supra* Appendix C at [23]; *Hoch v R* (1988) 165 CLR 292; *Pfennig v R* (1995) 69 ALJR 147.

104 Sections 97(2), 98(3) and 101(3).

105 See for provisional relevance s 57.

106 Section 102.

107 Section 103(1).

108 Section 106.

109 *A-G v Hitchcock* (1847) 1 Ex 91 at 99; note 14 *supra* vol 2, Appendix C at [181].

110 This will include a false statement made during the trial in question.

111 Thus overriding *Piddington v Bennet Wood Pty Ltd* (1940) 63 CLR 533.

Section 108 addresses the operation of the credibility rule in re-examination. It first provides[112] th: the exclusionary rule does not apply to credibility evidence adduced in re-examination of a witness.[113] It also provides[114] that the exclusionary rule will not apply to evidence of a prior consistent statement if evidence of a prior inconsistent statement has been admitted, or it is or will be suggested that evidence given by the witness has been fabricated or reconstructed, or is the result of a suggestion. The latter aspect is a relaxation of the present rule which takes a narrower approach, requiring that it be demonstrated that what is being alleged against a witness is that the evidence given in court is a recent invention.[115] The section also requires that a court give leave before evidence is adduced of a prior consistent statement.

The reference to the giving of leave here and elsewhere[116] in the Acts imports a reference to s 192. This is a general provision which empowers the judge when giving leave to give leave on such terms as the judge thinks fit. It also sets out matters which the judge should take into account. It is a non-exhaustive list.[117]

(iii) Credibility - The Accused

Under s 104 a defendant in criminal proceedings can only be cross-examined about matters going to his or her credibility if the court gives leave,[118] except where the cross-examination is directed to issues of bias, ability to be aware of or recall matters or the making of a prior inconsistent statement by the defendant.[119] Subsection (4) provides that where leave is required, it must not be given for cross-examination by the prosecutor on matters going to the defendant's credibility unless:

(a) evidence has been adduced by the defendant that tends to prove the defendant generally or in a particular respect, a person of good character; or

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

Paragraph (b) is more restrictive than the typical statutory provisions in this area in that, inter alia, it is not the nature or conduct of the defence that will be looked at,

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112 Subsection (1).

113 Subsection (2) deals with evidence to contradict that adduced under ss 105 and 107.

114 Subsection (3).

115 For example *Nominal Defendant v Clements* (1960) 104 CLR 476.

116 See ss 32(1) and (3), 37(1), 38(1) and (3), 46(1), 104(2), 105(8), 108(2), 112, 168, 191(3).

117 The list includes the impact on the length of the hearing, the extent to which the giving of leave would be unfair to a party or to a witness, the importance of the evidence, the nature of the proceeding, and the power of the court to adjourn or to make any other order or give directions.

118 Subsection (2).

119 Subsection (3). "Bias or motive to be untruthful" is intended to permit cross-examination as to a specific bias (for example, for or against another) affecting particular items of evidence not the general 'bias' or motive an accused person has in the sense of the accused's interest in the outcome of the case. It is referring to something not usually present. It should not be regarded as overriding *Rayney v R* (1994) 68 ALJR 917 and the case there cited. After all, at that stage the accused still has the benefit of the presumption of innocence.

but whether evidence has been adduced,[120] either in chief or in cross-examination which is relevant only because it reflects on the credibility of the prosecution witness. The ALRC view was that the rule should be tightened further, but it appears reasonable to conclude that the intention remains that the cross-examination should be allowed in exceptional circumstances only.[121] To minimise argument about the circumstances in which a defendant is exposed to such cross-examination, the Acts provide that evidence adduced by an accused about the events in relation to which the defendant has been prosecuted or the investigation of the offence, does not cause a loss of the protection provided by the legislation.[122] Limits are imposed on the rights of defendants to cross-examine each other with leave.[123] Leave is not to be given unless the defendant to be cross-examined has adduced evidence adverse to the cross-examining party and it has been admitted.[124]

(iv) Part 3.8 - Character Evidence

Section 109 limits the application of this Part to criminal proceedings. Section 110 provides an exception to the four exclusionary rules that would prevent the defendant in criminal proceedings having general or specific evidence of good character admitted into evidence. Section 111 provides an exception to the hearsay rule and the opinion rule for evidence of expert opinion relevant to a defendant's character where it is adduced on behalf of another defendant and is wholly or substantially based upon specialised knowledge possessed by the person giving evidence of the opinion. In return, the hearsay rule, opinion rule and tendency rule do not apply to rebuttal evidence. These provisions resolve uncertainties in the law.[125] The defendant is not to be cross-examined about matters arising out of the foregoing evidence unless the court gives leave.[126]

While it seems that there is no rule in the Acts expressly preventing the admission of bad character evidence of an accused, the unfairly prejudicial effect of such evidence and its lack of substantial probative value[127] will be sufficient to cause its exclusion under ss 97, 101 and the discretions.

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120 In cross-examination of prosecution witnesses, the section will only operate if the answers given tend to prove the requisite facts - it has to be 'adduced'.

121 Note 10 *supra* at [179]ff.

122 Subsection (5).

123 Subsection (6).

124 The Commonwealth Act also sets out a regime to apply in the event that an accused person has made an unsworn statement: s 105. The provision is intended to enable the prosecution to adduce evidence that might have been put to the defendant if that defendant had given sworn evidence. The provision was included to address the valid criticism of the right to give unsworn evidence that a defendant could make false accusations against Crown witnesses and the inability to cross-examine about matters going to credit conferred an unfair advantage on the defendant.

125 Note 14 *supra* vol 2, Appendix C at [167].

126 Section 112.

127 See note 14 *supra* vol 1 at [795]-[800].

K. Identification Evidence

Part 3.9 contains rules controlling the admissibility of evidence of identification. None exist under the common law.

(i) 'Visual Identification Evidence'

Section 114 deals with identification evidence based wholly or partly on what a person saw but does not include picture identification evidence.[128] Subsection (2) provides that visual identification evidence adduced by the prosecution 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 such a parade; or
(c) the defendant refused to take part in such a parade;

without the person who made it having been intentionally influenced to identify the defendant.

Subsection (3) lists inclusively matters that may be taken into account by the court in determining whether it was reasonable to hold the identification parade. Some statutory presumptions are created.[129] 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 that identification.[130]

(ii) Picture Identification

Section 115 provides a regime to control evidence of identification made by means of pictures kept for use by police officers. There are several limitations. Picture identification evidence is not admissible when adduced by the prosecutor

- if the pictures examined suggest that they are pictures of persons in police custody;[131] or
- if, when the pictures were examined, the defendant was in the custody of a police officer and the picture of the defendant that was examined was made before the defendant was taken into that police custody.[132]

These provisions are intended to minimise the risk of the jury concluding that the defendant has previous convictions.

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128 The latter is dealt with in the next section, s 115. The Acts are narrower in scope than the ALRC proposal, which extended to identification evidence based wholly or partly on what a person heard.

129 Section 114(4) and (5). It is presumed that it would not have been reasonable to hold an identification parade if it would have been unfair to the defendant to do so or if, at the time proposed, the defendant refused to take part unless his lawyer or another person chosen by the defendant was present and at the time the parade was to be conducted there were reasonable grounds to believe that it was not reasonably practical for such lawyer or person to be present.

130 Subsection (6).

131 Subsection (2).

132 This requirement does not apply where the defendant's appearance has changed significantly or it was not reasonably practical to make a picture of the defendant after the defendant was taken into that custody (subsection (4)).

In addition, picture identification evidence adduced by the prosecutor is not admissible if the defendant was in the custody of the police at the time for the offence with which he was charged unless the defendant refused to take part in an identification parade or his appearance has changed significantly between the time when the offence was committed and the time when the defendant was taken into custody, or it was not reasonable to hold an identification parade that included the defendant.[133]

Thus, the identification parade is made the primary technique and photo identification or picture identification a secondary one.

An accused, if he or she so wishes, may request the judge to inform the jury that the picture of the defendant was made after he or she was taken into custody or to warn the jury that they must not assume that the defendant has a criminal record or has previously been charged with an offence.[134]

Section 116 imposes an obligation on the trial judge where identification evidence has been admitted to inform the jury that there is a special need for caution before accepting such evidence and of the reasons for that need for caution. No particular form of words must be used.[135]

It may be said that s 116 reflects the common law in most Australian jurisdictions. The ALRC proposed a further provision[136] along the lines suggested in *R v Turnbull*,[137] requiring the trial judge to direct an acquittal where the prosecution case would fail but for identification evidence and there are no special circumstances or substantial independent evidence to support it. Regrettably, that provision has not been included.

L. Privileges

(i) Introduction

In Part 3.10, the Acts enact three privileges - client legal privilege,[138] religious confessions,[139] and the privilege against self-incrimination.[140] They also enact provisions that exclude evidence "in the public interest".[141] The privileges that presently attach in some jurisdictions to communications between doctor and patient[142] and, at common law, to title deeds will have no operation in the relevant proceedings in the relevant courts. It is proposed to refer to some of these provisions.

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133 Subsection (5).

134 Subsection (7).

135 Subsection (2). Cases such as *Domican v R* (1992) 173 CLR 555 can continue to provide guidance. The reader is referred, however, to the discussion of the weaknesses of identification evidence in ALRC Report No 26 note 14 *supra* vol 1 pp 229ff and references there cited. Psychological research has identified weaknesses in such evidence that tend to be overlooked.

136 Note 10 *supra*; s 105(4).

137 [1976] 3 All ER 549.

138 Sections 117-126.

139 Section 127.

140 Section 128.

141 Sections 129-133 (reasons for decisions, matters of state and evidence of settlement negotiations).

142 For example, Northern Territory, Tasmania and Victoria.

(ii) Client Legal Privilege[143]

The Acts provide a privilege attaching to communications between client and lawyer. It is the client's privilege.[144] It requires extensive provisions. The primary intention of those provisions is the removal of uncertainty rather than substantial reform. While the common law 'sole purpose' test has not been used, it may be said that the dominant purpose test which has been adopted, should not in practice produce results significantly different from those produced by the sole purpose test as stated in *Waterford v Commonwealth.*[145] The principal provisions setting out the client's privilege are ss 118 and 119. Section 118 deals with communications made and documents prepared for the purposes of legal advice. Section 119 deals with communications made and documents prepared for the purpose of the provision of legal services relating to Australian or overseas proceedings.

A change to the existing law is the creation of a privilege attaching to communications between an unrepresented party and another person or the contents of a confidential document prepared by or at the direction or request of an unrepresented party for the dominant purpose of preparing for or conducting proceedings.[146] This is intended to reflect what was accepted as one of the rationales for the protection of communications between client and lawyer and of a lawyer's notes and materials - namely, to facilitate the functioning of the adversary trial system.[147]

In each instance, ss 118 to 120 provide that evidence is not to be adduced. In other words, they attempt to exclude such evidence before the court has evidence before it as to what was in fact said or written in the communication or document.

There then follows, in ss 121 to 126, provisions which spell out the circumstances in which the privilege may be lost. These by and large follow the existing law but are intended to remove uncertainty in areas such as the loss of privilege in the event of disclosure.[148] Of particular note, however, is s 123 which changes the common law[149] by lifting the privilege for the benefit of defendants in criminal proceedings, except in the case of confidential communications or documents made between or prepared by an associated defendant or a lawyer acting for in connection with the prosecution of that person. It should also be noted that s 122(6) lifts the protection of the privilege in relation to documents that

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143 Part 3.10 Div I.

144 The sections impose the obligation to object on the client. The client's lawyer, however, pursuant to his or her retainer, is obliged to object in the absence of instruction to the contrary: *R v Craig* [1975] 1 NZLR 597; *Beere v Ward* (1821) JAC 779.

145 (1986-7) 163 CLR 54. *Hong Kong Bank v Murphy & Allen* [1992] 2 VR 419. It should be noted that the sole purpose test will continue to apply at the discovery stage. An issue might arise at trials whether a discovered document will be protected by the privilege at the hearing. That issue will be resolved by application of ss 121 to 126 which set out the circumstances in which the privilege is lost. Provided it is made clear at the discovery stage that the party is not consenting to disclosure but is disclosing the document under compulsion of law, the party should be able to maintain the privilege at the trial (s 121(1) and (2)) if it is otherwise applicable.

146 Section 120.

147 Note 14 *supra* vol 1, pp 496-7, [887].

148 Section 122(2)-(5); note 14 *supra* vol 2, Appendix C at [237]; note 10 *supra* Appendix C at [32]ff.

149 *Carter v Managing Partner, Northmore, Hale, Davey & Leake* (1995) 129 ALR 593.

a witness has used to revive his or her memory about a fact or opinion in or out of court[150] and evidence given by a police officer.[151] Section 124 deals with the situation of joint clients and s 125 spells out the circumstances in which the privilege may be lost in respect of a communication or document made or prepared in furtherance of fraud, the commission of an offence or civil penalty or a deliberate abuse of power. Section 126 removes the protection of the privilege from evidence of a communication or a document if evidence of them is reasonably necessary to enable a proper understanding of a communication or document for which privilege has been lost under ss 121 to 125.

(iii) Privilege for Religious Confessions

Section 127 provides that 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.

The confession must be made in accordance with the ritual of the church concerned.[152]

The privilege appears to be modelled on the previous New South Wales provision.[153] This privilege does not apply if the communication was made for criminal purposes.[154] A privilege for religious confessions has existed in some other jurisdictions - for example, Victoria, Tasmania and the Northern Territory. Victoria does not have a provision lifting the privilege in criminal proceedings but, like
New South Wales and unlike the other jurisdictions, requires that the confession be made in accordance with the ritual of the church concerned.[155]

(iv) Privilege in Respect of Self-incrimination[156]

Section 128 applies where a witness objects to giving evidence on the ground that to do so may tend to prove that he or she has committed an offence under an Australian or foreign law or is liable to a civil penalty. If the court finds that there are reasonable grounds for the objection the court is to inform the witness that he or she need not give evidence and that, if the witness does give evidence, the court will give a certificate under the section and inform the witness of the effect of the certificate. The effect of the certificate is that any evidence given in respect to which a certificate has been given and evidence of any information, document or thing obtained as a direct or indirect consequence of such evidence can not be used

150 Section 32.
151 Section 33.
152 Section 127(4).
153 *Evidence Act* 1898 (NSW) s 10.
154 Section 127(2).
155 The ALRC did not propose a specific privilege. It proposed a discretion to protect all confidential communications: note 14 *supra* vol 1 at [903]ff.
156 The provisions for this privilege were developed from provisions such as *Evidence Act* 1971(ACT) s 57, *Evidence Act* 1906 (WA) ss 11-13, 20, and *Evidence Act* 1910 (Tas) ss 87-9 and 101.

against the person in any proceeding in an Australian court.[157] This embargo, however, does not apply to a criminal proceeding in respect of the falsity of the evidence given.[158]

The court is also empowered to require[159] the witness to give evidence if satisfied that

- the evidence concerned may tend to prove that the witness has committed an offence or may be liable to a penalty under Australian law;[160]
- the evidence does not tend to prove that the witness has committed an offence against or arising under a civil penalty under the rules of a foreign country; and
- 'the interests of justice' require that the witness give evidence.[161]

As to what are 'the interests of justice',[162] views will differ. Rumpole's Judge Bullingham and Blackstone would differ about the interpretation of the phrase. Some help may be gained from a consideration of the general principles that guided the proposals. Other policy issues arise.[163] An important matter to bear in mind is that a person compelled to give evidence may, for his or her own physical safety, or to minimise his or her role, commit perjury or be less than frank. Thus, it can not be assumed that forcing a person to give such evidence will aid the accurate fact finding of the court and thus the interests of justice. In addition, it is not in the interests of justice for the legal system to be seen to operate in an unduly harsh manner towards witnesses.

Bearing these points in mind, in determining what the interests of justice require it may be relevant to consider the following matters:

(a) the probative value of the evidence and, in particular,
  - the importance of the evidence in the proceeding; and
  - the likelihood that the evidence may be unreliable even if a certificate is given; and

(b) the nature of the proceedings and, in particular,
  - the nature of the relevant offence, cause of action or defence; and
  - if the proceedings are criminal in nature, whether the evidence is adduced by the defendant or by the prosecutor; and

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157 Subsection (7). An Australian court is defined in the Dictionary to include all Australian courts, a justice or arbitrator under an Australian law, (a law of a Commonwealth State or Territory) and any person authorised by Australian law or by consent to hear, receive and examine evidence or a person or body required under an Australian law to apply the laws of evidence. It is thus of broad application.

158 Subsection (7). It also does not apply in criminal proceedings to the giving of evidence by a defendant about the issues in the case in which he or she is a defendant: subsection (8).

159 Note 10 *supra* at [214]ff did not recommend such a power.

160 The court's power to require a person to give evidence is, therefore, limited to cases where the only risk the witness runs relates to proceedings under Australian law and where a certificate may, therefore, be effective.

161 Subsection (5).

162 The expression also appears in s 4(2): for a criticism of the use of standards in legislation see The Hon Justice MH McHugh, "The Growth of Legislation and Litigation" (1995) 69 ALJ 37 at 43-7.

163 They are discussed in note 14 *supra* vol 1 at [852]ff.

(c) the consequences for the witness and, in particular,
- the nature of the offence or penalty in respect to which the witness may incriminate himself or herself;
- the likelihood of any other proceeding (whether or not in a court, and whether or not in Australia) being taken in relation to the offence in respect of which the witness may incriminate himself or herself, including penalty proceedings;
- the risk of harm to the witness or other persons if the evidence is given or published;[164]
- whether the substance of the evidence has already been published; and
- any means available to limit publication of the evidence if given.

If the witness gives evidence, the court is to cause a certificate to be given.[165] A certificate is also to be given where the objection has been overruled but, after the evidence has been given, the court is satisfied that there were reasonable grounds for the objection.[166] It should be noted that bodies corporate can not claim this privilege.[167]

(v) Evidence Excluded in the Public Interest

The Acts deal with a number of matters. Firstly, they deal with evidence of reasons for decision by a judge or arbitrator and their deliberations.[168] It confines evidence of such matters to published reasons.[169] There is also an embargo on the giving of evidence of the reasons and deliberations of members of the jury.[170] The section does not apply in relation to certain criminal offences and contempt and various types of appeals.[171]

The Acts also provide[172] public interest immunity for evidence of "matters of state".[173] This provision also uses the expression "evidence is not to be adduced". The court can exercise the power to direct that such evidence not be adduced on its own initiative.[174] The provision reflects the common law. Couching the provision in terms of a power to "direct" has the effect of incorporating s 192 by reference, thus giving guidance to the court and empowering the court to impose terms.

The remaining provision[175] in this Division sets out in detail the circumstances in which communications made or documents prepared in connection with an

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164 If it is relevant to consider the potential legal consequences for the witness 'in the interests of justice' it is relevant to also consider the practical consequences. They are relevant, in any event because it is not 'in the interests of justice' to receive unreliable evidence.
165 Subsection (3).
166 Subsection (4).
167 Section 187.
168 Section 129(1).
169 Section 129(3).
170 Section 129(4).
171 Section 129(5).
172 Section 130.
173 Defined s 130(4).
174 Section 30(2).
175 Section 31.

attempt[176] to negotiate a settlement of a dispute are protected. It will apply in subsequent litigation involving different parties and different subject matters. Again the expression is used - "evidence is not to be adduced". If an issue arises in a proceeding about whether a settlement agreement was reached, the embargo is lifted.[177] It should be noted that the protection is lost where the communication was made, or a document prepared in furtherance of the commission of a fraud, offence or an act that renders a person liable to civil penalty or is in furtherance of the deliberate abuse of power.[178]

The provision applies where the negotiations concern an overseas proceeding.[179] It does not apply to attempts to negotiate the settlement of criminal proceedings.[180]

(vi) Privileges - Ancillary Provisions

Division 4 has provisions applicable generally to the above privileges and immunities. The court is obliged to inform witnesses or parties of their right to claim privileges.[181] The court is given a power to order that any document in question be produced and to inspect it for the purpose of determining any question about the application of the sections.[182] Section 134 provides that evidence that must not be adduced because of the operation of any of the above provisions is not admissible. Thus, those provisions operate as rules of admissibility.

M. Discretions to Exclude Evidence and Limit Use

The provisions in Part 3.11 are the final provisions dealing with admissibility of evidence. They contain all the discretions other than the *Lee* discretion.[183] Reference has already been made to s 135 (the general discretion to exclude evidence) in the discussion of the relevance provisions. Section 137 contains the prejudice and probative value discretion, available at common law in criminal proceedings. Both s 135 and s 137 use the concept of 'unfair prejudice'. The word 'unfair' is used to make it clear that the discretion is not available merely because the evidence is adverse to the case of the party seeking to invoke the discretion. There must be something more. Typically, where the evidence reflects badly on the character of a party and may, therefore, introduce irrational considerations, it may be considered to be unfair. Reference has also been made to s 136 which empowers the court to limit the use to be made of the evidence where there is a danger that the use of the evidence might be unfairly prejudicial to a party or be misleading and confusing. Another discretion, already referred to, is a restatement of the *Bunning v Cross* discretion, the discretion to exclude improperly

176 Thus, the section overrides *Field v Commissioner for Railways* (1957) 99 CLR 285.
177 Section 131(2)(f).
178 Section 131(2)(i) and (3) and (4).
179 Section 131(5)(a).
180 Section 131(5)(b)).
181 Section 132.
182 Section 133.
183 Section 90.

or illegally obtained evidence.[184] It applies in civil proceedings as well as in criminal proceedings. As noted above, the Acts change the common law discretion by placing the onus on the party tendering the evidence to establish that it should be admitted once the impropriety or illegality is established. Subsection (3) sets out a number of matters which may be relevant to the exercise of the discretion.

VIII. CHANGES TO THE CONTENT OF THE LAW - PROOF

A. Standard of Proof

Chapter 4 opens with provisions dealing with the standard of proof required in civil and criminal proceedings and for the admissibility of evidence. Most will regard these provisions as restating the law, although they in fact deal with some uncertainties in the law.[185]

B. Judicial Notice

A more significant change is made in Part 4.2, which deals with what is traditionally called judicial notice. Section 143 provides that proof is not required of the making of Acts and Regulations and proclamations and instruments of a legislative character and the like, and empowers the judge to inform himself or herself in any way the judge sees fit. Section 144 expands the common law in that the judge, in addition to acting upon local or general common knowledge, is empowered to act upon knowledge that is not reasonably open to question and is capable of verification by reference to a document the authority of which can not reasonably be questioned. The judge may acquire knowledge of the above kind in any way the judge thinks fit.[186] The judge is required to give the parties an opportunity to make submissions and refer to relevant information to ensure that the parties are not unfairly prejudiced.[187]

C. Facilitation of Proof

Part 4.3 contains a number of provisions designed to facilitate the proof of public and like documents and seals and the like. I do not propose to address all these provisions in detail but propose to focus on two provisions which are of particular importance. They are ss 146 and 147. They contain provisions which will facilitate the proof of machine produced evidence, including computer produced evidence.

It should be noted that there is no express reference in the Acts to the admissibility of evidence produced by computer technology or any other technology. The approach taken in the Acts is to provide general provisions which are capable of being used regardless of the technology employed and to facilitate

184 Section 138.
185 Sections 140-142.
186 Section 144(2).
187 Subsection (4).

the admissibility of such evidence where appropriate, while providing adequate safeguards for those against whom the evidence is led. To date, the legislative attempts to deal with such evidence have imposed requirements that are too technical and soon out of date and have been either too strict, and thus excluded evidence which should not be excluded, or have taken approaches that are too liberal, and denied the parties against whom the evidence is led adequate protection.[188]

The common law required that before evidence produced by a device, including a computer, could be admitted, it must be shown, at least to a prima facie extent, that the device was capable of doing that which it is claimed that it can do.[189] The analysis adopted by the Acts is that this requirement is an aspect of provisional relevance.[190] Section 146(2) facilitates the proof that a device was capable of doing that which is claimed for it by creating a presumption that the device in producing the document or thing on the occasion in question achieved the outcome claimed if it is reasonably open to find that the device or process is one which, if properly used, ordinarily produces that outcome.

Section 147 is intended to provide additional assistance in the case of a document which is, or was at the time it was produced, part of the records of or kept for the purposes of a business and the device or process is, or was at the time, used for the purposes of the business. In those circumstances it is presumed that in producing the document, the device or process produced the claimed outcome. That presumption, however, does not apply to the contents of a document produced for the purpose of or in contemplation of litigation or in connection with the investigation relating to a criminal proceeding.

Both presumptions apply "unless evidence sufficient to raise doubt about the presumption is produced."

Protection is given to the party against whom such evidence is adduced in ss 166 to 169. They enable a party to request the production of documents, and give the right to examine, test or copy the whole or part of the specified document or thing, and to examine or test the document or the way it was produced or has been kept.[191] Thus, the power is given to the person against whom, for example, computer produced evidence is led to obtain orders to examine the actual system and the data upon which it was based. Such an investigation may be needed in some cases and can be done under court control but where it is best done - initially by the parties and away from the courtroom.

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188 See note 14 *supra* vol 1 at [344].

189 For example *R v Weatherall* (1981) 27 SASR 238. Other potential obstacles were the 'best evidence' rule and hearsay rule, the former because the print out is in a sense always secondary evidence and the latter because often the data reproduced was supplied by people. The former is abolished by the Acts. The latter is substantially modified and the business record exception will assist where business records are involved.

190 See s 57 and note 14 *supra* vol 1 at [979]ff.

191 Note also s 193 in relation to discovery.

D. Corroboration

The Acts abolish the law relating to corroboration with one exception - the law requiring corroboration of the offence of perjury.[192] The aim of these provisions is to wipe the slate clean (except for the crime of perjury) and to start again.

Section 165 then provides a regime for an appropriate response to evidence that is of a kind that may be unreliable. It applies in both civil and criminal proceedings. It lists inclusively some categories of evidence which may be unreliable.[193]

The section provides that if there is a jury and a party so requests, the judge, unless there is good reason for not doing so, is to warn the jury that the evidence may be unreliable, inform the jury of matters that may cause it to be unreliable and warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.[194] The result is that judges will not be required to direct juries about what is corroboration and what evidence is capable of amounting to corroboration and the other directions the common law requires.[195] A criticism made by the ALRC of the traditional warnings was that they directed the jury's attention away from the unreliability of the evidence to the question whether there was corroboration and, once satisfied that there was corroboration, encourage the jury to assume the evidence in question was reliable, forgetting that the factors that rendered it unreliable remain.[196] It is not necessary to use a particular form of words in giving the warning or information.[197] The section does not affect any other power of the judge to give a warning to or inform the jury.[198]

E. Proof - Ancillary Provisions

The remaining part of Chapter 4 deals with ancillary provisions. The following are of general application.[199]

(i) Requests

Reference has already been made to ss 166 to 169 which deal with requests for information, documents, the production of witnesses, and the right to test. The procedure can be invoked when questions arise about the admissibility of hearsay evidence, convictions, documents and things.

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192 Sections 164(1) and (3) - and similar or related offences.

193 The list includes: hearsay evidence; admissions; identification evidence; evidence that may be affected by age, ill health or injury; evidence given in a criminal proceeding by a witness who might reasonably be supposed to have been criminally concerned in the events; evidence given in a criminal proceeding by a prison informer; evidence in the form of a 'verbal'; evidence given by a person seeking relief in a proceeding against the estate of a deceased person. The list is inclusive. Therefore, for example, a warning could be sought concerning a signed statement (*McKinney v R* (1991) 171 CLR 468) or in sexual offence cases.

194 Subsections (2) and (3).

195 Note 14 *supra* vol 1 at [1016].

196 *Ibid* at [490] and p 270.

197 Section 165(4)

198 Section 165(5).

199 Not referred to are the provisions in relation to foreign law, expert certificates and convictions: ss 174-180.

A party is given the right to make "a reasonable request"[200] and may seek orders from the court if the other party fails or refuses to comply with a request without "reasonable cause".[201] The court can, inter alia, order compliance with the request, or that the evidence in relation to which the request was made not be admitted and can make appropriate cost orders.[202] Thus, the court can control the procedure and take steps to ensure it is not abused. Matters relevant to the exercise of the courts power are set out.[203]

(ii) Affidavits to Prove Evidentiary Facts

Section 170 is significant in that it enables evidence to be given by affidavit of facts to be proved to secure the admissibility of a document or thing.[204] Section 171 sets out who may give such evidence. Section 172 provides an exception to the rules of exclusion in Chapter 3 of the Acts. It allows the evidence in such an affidavit to be based on knowledge, information or belief, provided the source of the knowledge, information or belief is set out.[205] The copy of the affidavit or statement must be served on each party a reasonable time before the hearing and the party who relies upon the affidavit or statement must call the deponent or person making the statement if asked to do so.[206] A witness statement may be used with respect to a public document.

IX. CHANGES TO THE LAW- MISCELLANEOUS PROVISIONS

A. Inferences

A provision of potential significance is s 183 which deals with inferences. It provides:

> If the question arises about the application of the provisions 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.

This, like the section in the relevance provisions, is designed to remove the agnostic approach that has been taken in dealing with questions of admissibility of evidence in the form of a document or thing and, in particular, the question of what inference may be drawn from it as to facts relevant to its admissibility. Any

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200 Section 167.
201 Section 169(1).
202 Section 169(1).
203 Section 169(5).
204 Namely, the proof of contents of documents (s 48), documentary first hand hearsay exceptions, business records and tags labels and other writings and telecommunications (ss 63, 64, 65, 69, 70 and 71) and the facts needed to take advantage of the provisions relating to the facilitation of proof, including ss 146 and 147, and Commonwealth records (s 82).
205 The exclusionary discretions are presumably available to the party against whom the evidence is led.
206 Section 173.

reasonable inference "may" be drawn from the document or thing itself without evidence from witnesses directed to proof of the fact that could be so inferred.

B. Admissions in Criminal Proceedings

Another important provision is s 184 which provides that in or before a criminal proceeding a defendant may

> ...if advised to do so by his or her lawyer:
> (a) admit matters of fact; and
> (b) give any consent that a party to a civil proceeding may make or give.

C. Voir Dire

Section 189 sets out a regime to apply to voir dire proceedings - that is, proceedings for determining whether evidence should be admitted or can be used against a particular person and whether a witness is competent or compellable.

D. Waiver of Rules

Another important rule is s 190 which allows for the waiver of rules of evidence. Subsection (1) provides that the court may, if the parties consent, dispense with the application of the rules governing the manner of questioning, the proof of contents of documents and views, and the rules of admissibility. Subsection (2) stipulates that such consent is not effective in criminal proceedings unless the defendant has been advised to consent by his or her lawyer and the court is satisfied that the defendant understands the consequences of giving the consent. Power is also given to the court, in civil proceedings, to order dispensation with the rules mentioned above without the consent of a party if satisfied that:

> (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.

Subsection (4) sets out matters that might be taken into account in the exercise of that discretion.

X. CONCLUSION

It will be appreciated from the above overview that the Acts are ambitious pieces of legislation. It will be some time, I venture to suggest, before the courts and the profession have a complete understanding of the new rules. Such an understanding will come from repeated reference to the Acts and from the application of the new rules in court.

The immediate focus is likely to be on the substantive changes made to the laws of evidence. In the long term, however, it is likely that the significance of the Acts will be seen to lie in the fact that they introduce a more flexible set of rules and extend more discretionary powers to the courts, while introducing procedural protections to parties against whom evidence is led. If the Acts are applied as they might be said to have been intended, it is likely that the judges and practitioners

will find themselves debating evidentiary issues more often by reference to policy and principle. It is likely too that they will have to consider more often the weight to be attached to evidence that would in the past have been excluded.

Any pain or discomfort resulting from the change, however, should be minimised for at least two reasons. Firstly, most debate in litigation will, as in the past, focus on questions of relevance. To deal with relevance issues it will be necessary to develop an understanding of ss 55 to 58 (the relevance provisions) and s 135 (the general exclusionary discretion). Secondly, while many and often significant changes have been made, a totally new regime has not been substituted and the Acts continue to use terminology and concepts with which courts and practitioners should be familiar. Thus, practitioners will be able to continue to rely upon their understanding of the past law to provide them with that awareness of danger and sense of opportunity that comes instinctively to a practitioner of experience. After all, while the debate under the new rules may often be different, those rules are directed to the same problems which the old rules attempted to address.