

Examinable excerpts of

Evidence Act 2008

as at 2 October 2019

PART 1.2—APPLICATION OF THIS ACT

4 Courts and proceedings to which Act applies

- (1) This Act applies to all proceedings in a Victorian court, including proceedings that—
 - (a) relate to bail; or
 - (b) are interlocutory proceedings or proceedings of a similar kind; or
 - (c) are heard in chambers; or
 - (d) subject to subsection (2), relate to sentencing.
- (2) If such a proceeding relates to sentencing—
 - (a) this Act applies only if the court directs that the law of evidence applies in the proceeding; and
 - (b) if the court specifies in the direction that the law of evidence applies only in relation to specified matters—the direction has effect accordingly.
- (3) The court must make a direction if—
 - (a) a party to the proceeding applies for such a direction in relation to the proof of a fact; and
 - (b) in the court's opinion, the proceeding involves proof of that fact, and that fact is or will be significant in determining a sentence to be imposed in the proceeding.
- (4) The court must make a direction if the court considers it appropriate to make such a direction in the interests of justice.
- (5) In this section, a proceeding that relates to sentencing includes a proceeding for an order under Part 4 of the **Sentencing Act 1991**.

Notes

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

- 2 **Victorian court** is defined in the Dictionary. The definition includes persons or bodies required to apply the laws of evidence.
- 3 The Commonwealth Act includes 2 additional subsections that exclude the application of that Act to appeals from a court of a State (including appeals from a court of a State exercising federal jurisdiction) and certain other courts.
- 4 Provisions in other Victorian Acts which relieve courts from the obligation to apply the rules of evidence in certain proceedings are preserved by section 8 of this Act. These include—
 - * * * * *
 - section 215 of the **Children, Youth and Families Act 2005**;
 - sections 8(6) and 13A of the **Crimes (Family Violence) Act 1987**;
 - section 38 of the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997**;
 - section 127 of the **Electoral Act 2002**.
- 5 Subsection (5) is not included in the Commonwealth Act or New South Wales Act.

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8 Operation of Acts

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

Note

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

9 Application of common law and equity

- (1) This Act does not affect the operation of a principle or rule of common law or equity in relation to evidence in a proceeding to which this Act applies, except so far as this Act provides otherwise expressly or by necessary intendment.
- (2) Without limiting subsection (1), this Act does not affect the operation of such a principle or rule so far as it relates to any of the following—
 - (a) admission or use of evidence of reasons for a decision of a member of a jury, or of the deliberations of a member of a jury in relation to such a decision, in a proceeding by way of appeal from a judgment, decree, order or sentence of a court;
 - (b) the operation of a legal or evidential presumption that is not inconsistent with this Act;

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

CHAPTER 2—ADDUCING EVIDENCE

PART 2.1—WITNESSES

Division 1—Competence and compellability of witnesses

12 Competence and compellability

Except as otherwise provided by this Act—

- (a) every person is competent to give evidence; and
- (b) a person who is competent to give evidence about a fact is compellable to give that evidence.

13 Competence—lack of capacity

- (1) A person is not competent to give evidence about a fact if, for any reason (including a mental, intellectual or physical disability)—
 - (a) the person does not have the capacity to understand a question about the fact; or
 - (b) the person does not have the capacity to give an answer that can be understood to a question about the fact—

and that incapacity cannot be overcome.

Note

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

- (2) A person who, because of subsection (1), is not competent to give evidence about a fact may be competent to give evidence about other facts.
- (3) A person who is competent to give evidence about a fact is not competent to give sworn or affirmed evidence about the fact if the person does not have the capacity to understand that, in giving evidence, he or she is under an obligation to give truthful evidence.
- (4) A person who is not competent to give sworn or affirmed evidence about a fact may, subject to subsection (5), be competent to give unsworn evidence or evidence that is not affirmed about the fact.
- (5) A person who, because of subsection (3), is not competent to give sworn or affirmed evidence is competent to give unsworn evidence or evidence that is not affirmed if the court has told the person —
 - (a) that it is important to tell the truth; and
 - (b) that he or she may be asked questions that he or she does not know, or cannot remember, the answer to, and that he or she should tell the court if this occurs; and
 - (c) that he or she may be asked questions that suggest certain statements are true or untrue and that he or she should agree with

the statements that he or she believes are true and should feel no pressure to agree with statements that he or she believes are untrue.

- (6) It is presumed, unless the contrary is proved, that a person is not incompetent because of this section.
- (7) Evidence that has been given by a witness does not become inadmissible merely because, before the witness finishes giving evidence, he or she dies or ceases to be competent to give evidence.
- (8) For the purpose of determining a question arising under this section, the court may inform itself as it thinks fit, including by obtaining information from a person who has relevant specialised knowledge based on the person's training, study or experience.

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17 Competence and compellability—accused in criminal proceedings

- (1) This section applies only in a criminal proceeding.
- (2) An accused is not competent to give evidence as a witness for the prosecution.
- (3) An associated accused is not compellable to give evidence for or against an accused in a criminal proceeding, unless the associated accused is being tried separately from the accused.
- (4) If a witness is an associated accused who is being tried jointly with the accused in the proceeding, the court is to satisfy itself (if there is a jury, in the jury's absence) that the witness is aware of the effect of subsection (3).

Note

Associated accused is defined in the Dictionary.

18 Compellability of spouses and others in criminal proceedings generally

- (1) This section applies only in a criminal proceeding.
- (2) A person who, when required to give evidence, is the spouse, de facto partner, parent or child of an accused may object to being required—
 - (a) to give evidence; or
 - (b) to give evidence of a communication between the person and the accused—as a witness for the prosecution.
- (3) The objection is to be made before the person gives the evidence or as soon as practicable after the person becomes aware of the right so to object, whichever is the later.
- (4) If it appears to the court that a person may have a right to make an objection under this section, the court is to satisfy itself that the person is aware of the effect of this section as it may apply to the person.

- (5) If there is a jury, the court is to hear and determine any objection under this section in the absence of the jury.
- (6) A person who makes an objection under this section to giving evidence or giving evidence of a communication must not be required to give the evidence if the court finds that—
 - (a) there is a likelihood that harm would or might be caused (whether directly or indirectly) to the person, or to the relationship between the person and the accused, if the person gives the evidence; and
 - (b) the nature and extent of that harm outweighs the desirability of having the evidence given.
- (7) Without limiting the matters that may be taken into account by the court for the purposes of subsection (6), it must take into account the following—
 - (a) the nature and gravity of the offence for which the accused is being prosecuted;
 - (b) the substance and importance of any evidence that the person might give and the weight that is likely to be attached to it;
 - (c) whether any other evidence concerning the matters to which the evidence of the person would relate is reasonably available to the prosecutor;
 - (d) the nature of the relationship between the accused and the person;
 - (e) whether, in giving the evidence, the person would have to disclose matter that was received by the person in confidence from the accused.
- (8) If an objection under this section has been determined, the prosecutor may not comment on—
 - (a) the objection; or
 - (b) the decision of the court in relation to the objection; or
 - (c) the failure of the person to give evidence.

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20 Comment on failure to give evidence

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Note

Section 20 of the Commonwealth Act and New South Wales Act requires the judge to give certain directions to the jury relating to the failure to give evidence or call witnesses in a criminal proceeding for an indictable offence. Division 6 of Part 4 of the **Jury Directions Act 2015** contains provisions relating to the failure to give evidence or call a witness that apply in criminal trials.

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32 Attempts to revive memory in court

- (1) A witness must not, in the course of giving evidence, use a document to try to revive his or her memory about a fact or opinion unless the court gives leave.
- (2) Without limiting the matters that the court may take into account in deciding whether to give leave, it is to take into account—
 - (a) whether the witness will be able to recall the fact or opinion adequately without using the document; and
 - (b) whether so much of the document as the witness proposes to use is, or is a copy of, a document that—
 - (i) was written or made by the witness when the events recorded in it were fresh in his or her memory; or
 - (ii) was, at such a time, found by the witness to be accurate.
- (3) If a witness has, while giving evidence, used a document to try to revive his or her memory about a fact or opinion, the witness may, with the leave of the court, read aloud, as part of his or her evidence, so much of the document as relates to that fact or opinion.
- (4) The court is, on the request of a party, to give such directions as the court thinks fit to ensure that so much of the document as relates to the proceeding is produced to that party.

33 Evidence given by police officers

- (1) Despite section 32, in any criminal proceeding, a police officer may give evidence in chief for the prosecution by reading or being led through a written statement previously made by the police officer.
- (2) Evidence may not be so given unless—
 - (a) the statement was made by the police officer at the time of or soon after the occurrence of the events to which it refers; and
 - (b) the police officer signed the statement when it was made; and
 - (c) a copy of the statement had been given to the person charged or to the person's Australian legal practitioner a reasonable time before the hearing of the evidence for the prosecution.

Note

Paragraph (c) differs from the Commonwealth Act and New South Wales Act.

- (3) A reference in this section to a police officer includes a reference to a person who, at the time the statement concerned was made, was a police officer.

34 Attempts to revive memory out of court

- (1) The court may, on the request of a party, give such directions as are appropriate to ensure that specified documents and things used by a witness otherwise than while giving evidence to try to revive his or her memory are produced to the party for the purposes of the proceeding.

- (2) The court may refuse to admit the evidence given by the witness so far as it concerns a fact as to which the witness so tried to revive his or her memory if, without reasonable excuse, the directions have not been complied with

35 Effect of calling for production of documents

- (1) A party is not to be required to tender a document only because the party, whether under this Act or otherwise—
 - (a) called for the document to be produced to the party; or
 - (b) inspected it when it was so produced.
- (2) The party who produces a document so called for is not entitled to tender it only because the party to whom it was produced, or who inspected it, fails to tender it.
- ...

Division 4—Examination in chief and re-examination

37 Leading questions

- (1) A leading question must not be put to a witness in examination in chief or in re-examination unless—
 - (a) the court gives leave; or
 - (b) the question relates to a matter introductory to the witness's evidence; or
 - (c) no objection is made to the question and (leaving aside the party conducting the examination in chief or re-examination) each other party to the proceeding is represented by an Australian legal practitioner or prosecutor; or
 - (d) the question relates to a matter that is not in dispute; or
 - (e) if the witness has specialised knowledge based on the witness's training, study or experience—the question is asked for the purpose of obtaining the witness's opinion about a hypothetical statement of facts, being facts in respect of which evidence has been, or is intended to be, given.
- (2) Unless the court otherwise directs, subsection (1) does not apply in civil proceedings to a question that relates to an investigation, inspection or report that the witness made in the course of carrying out public or official duties.
- (3) Subsection (1) does not prevent a court from exercising power under rules of court to allow a written statement or report to be tendered or treated as evidence in chief of its maker.

Note

Leading question is defined in the Dictionary.

38 Unfavourable witnesses

- (1) A party who called a witness may, with the leave of the court, question the witness, as though the party were cross-examining the witness, about—
 - (a) evidence given by the witness that is unfavourable to the party; or
 - (b) a matter of which the witness may reasonably be supposed to have knowledge and about which it appears to the court the witness is not, in examination in chief, making a genuine attempt to give evidence; or
 - (c) whether the witness has, at any time, made a prior inconsistent statement.
- (2) Questioning a witness under this section is taken to be cross-examination for the purposes of this Act (other than section 39).
- (3) The party questioning the witness under this section may, with the leave of the court, question the witness about matters relevant only to the witness's credibility.

Note

The rules about admissibility of evidence relevant only to credibility are set out in Part 3.7.

- (4) Questioning under this section is to take place before the other parties cross-examine the witness, unless the court otherwise directs.
- (5) If the court so directs, the order in which the parties question the witness is to be as the court directs.
- (6) Without limiting the matters that the court may take into account in determining whether to give leave or a direction under this section, it is to take into account—
 - (a) whether the party gave notice at the earliest opportunity of the party's intention to seek leave; and

Note

Paragraph (a) differs from the Commonwealth Act and New South Wales Act.

- (b) the matters on which, and the extent to which, the witness has been, or is likely to be, questioned by another party.
- (7) A party is subject to the same liability to be cross-examined under this section as any other witness if—
 - (a) a proceeding is being conducted in the name of the party by or on behalf of an insurer or other person; and
 - (b) the party is a witness in the proceeding.

39 Limits on re-examination

On re-examination—

- (a) a witness may be questioned about matters arising out of evidence given by the witness in cross-examination; and

- (b) other questions may not be put to the witness unless the court gives leave.

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Division 5—Cross-examination

41 Improper questions

- (1) The court must disallow an improper question or improper questioning put to a witness in cross-examination, or inform the witness that it need not be answered.

- (3) In this section, *improper question or improper questioning* means a question or a sequence of questions put to a witness that—
 - (a) is misleading or confusing; or
 - (b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; or
 - (c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate; or
 - (d) has no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability).

- (5) A question is not an improper question merely because—
 - (a) the question challenges the truthfulness of the witness or the consistency or accuracy of any statement made by the witness; or
 - (b) the question requires the witness to discuss a subject that could be considered distasteful to, or private by, the witness.
- (6) A party may object to a question put to a witness on the ground that it is an improper question.
- (7) However, the duty imposed on the court by this section applies whether or not an objection is raised to a particular question.
- (8) A failure by the court to disallow a question under this section, or to inform the witness that it need not be answered, does not affect the admissibility in evidence of any answer given by the witness in response to the question.

Notes

- 1 A person must not, without the express permission of a court, print or publish any question that the court has disallowed under this section—see section 195.
- 2 Section 41 differs from the Commonwealth Act and New South Wales Act.

42 Leading questions

- (1) A party may put a leading question to a witness in cross-examination unless the court disallows the question or directs the witness not to answer it.
- (2) Without limiting the matters that the court may take into account in deciding whether to disallow the question or give such a direction, it is to take into account the extent to which—
 - (a) evidence that has been given by the witness in examination in chief is unfavourable to the party who called the witness; and
 - (b) the witness has an interest consistent with an interest of the cross-examiner; and
 - (c) the witness is sympathetic to the party conducting the cross-examination, either generally or about a particular matter; and
 - (d) the witness's age, or any mental, intellectual or physical disability to which the witness is subject, may affect the witness's answers.
- (3) The court is to disallow the question, or direct the witness not to answer it, if the court is satisfied that the facts concerned would be better ascertained if leading questions were not used.
- (4) This section does not limit the court's power to control leading questions.

Note

Leading question is defined in the Dictionary.

43 Prior inconsistent statements of witnesses

- (1) A witness may be cross-examined about a prior inconsistent statement alleged to have been made by the witness whether or not—
 - (a) complete particulars of the statement have been given to the witness; or
 - (b) a document containing a record of the statement has been shown to the witness.
- (2) If, in cross-examination, a witness does not admit that he or she has made a prior inconsistent statement, the cross-examiner is not to adduce evidence of the statement otherwise than from the witness unless, in the cross-examination, the cross-examiner—
 - (a) informed the witness of enough of the circumstances of the making of the statement to enable the witness to identify the statement; and
 - (b) drew the witness's attention to so much of the statement as is inconsistent with the witness's evidence.
- (3) For the purpose of adducing evidence of the statement, a party may re-open the party's case.

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45 Production of documents

- (1) This section applies if a party is cross-examining or has cross-examined a witness about—
 - (a) a prior inconsistent statement alleged to have been made by the witness that is recorded in a document; or
 - (b) a previous representation alleged to have been made by another person that is recorded in a document.
- (2) If the court so orders or if another party so requires, the party must produce—
 - (a) the document; or
 - (b) such evidence of the contents of the document as is available to the party—

to the court or to that other party.
- (3) The court may—
 - (a) examine a document or evidence that has been so produced; and
 - (b) give directions as to its use; and
 - (c) admit it even if it has not been tendered by a party.
- (4) Subsection (3) does not permit the court to admit a document or evidence that is not admissible because of Chapter 3.
- (5) The mere production of a document to a witness who is being cross-examined does not give rise to a requirement that the cross-examiner tender the document.

46 Leave to recall witnesses

- (1) The court may give leave to a party to recall a witness to give evidence about a matter raised by evidence adduced by another party, being a matter on which the witness was not cross-examined, if the evidence concerned has been admitted and—
 - (a) it contradicts evidence about the matter given by the witness in examination in chief; or
 - (b) the witness could have given evidence about the matter in examination in chief.
- (2) A reference in this section to a matter raised by evidence adduced by another party includes a reference to an inference drawn from, or that the party intends to draw from, that evidence.

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PART 2.2—DOCUMENTS

48 Proof of contents of documents

- (1) A party may adduce evidence of the contents of a document in question by tendering the document in question or by any one or more of the following methods—
 - (a) adducing evidence of an admission made by another party to the proceeding as to the contents of the document in question;
 - (b) tendering a document that—
 - (i) is or purports to be a copy of the document in question; and
 - (ii) has been produced, or purports to have been produced, by a device that reproduces the contents of documents;
 - (c) if the document in question is an article or thing by which words are recorded in such a way as to be capable of being reproduced as sound, or in which words are recorded in a code (including shorthand writing)—tendering a document that is or purports to be a transcript of the words;
 - (d) if the document in question is an article or thing on or in which information is stored in such a way that it cannot be used by the court unless a device is used to retrieve, produce or collate it—tendering a document that was or purports to have been produced by use of the device;
 - (e) tendering a document that—
 - (i) forms part of the records of or kept by a business (whether or not the business is still in existence); and
 - (ii) is or purports to be a copy of, or an extract from or a summary of, the document in question, or is or purports to be a copy of such an extract or summary;
 - (f) if the document in question is a public document—tendering a document that is or purports to be a copy of the document in question and that is or purports to have been printed—
 - (i) by a person authorised by or on behalf of the Government to print the document or by the Government Printer of the Commonwealth or by the government or official printer of another State or a Territory; or
 - (ii) by the authority of the Government or administration of the State, the Commonwealth, another State, a Territory or a foreign country; or
 - (iii) by authority of an Australian Parliament, a House of an Australian Parliament, a committee of such a House or a committee of an Australian Parliament.
- (2) Subsection (1) applies to a document in question whether the document in question is available to the party or not.
- (3) If the party adduces evidence of the contents of a document under subsection (1)(a), the evidence may only be used—

- (a) in respect of the party's case against the other party who made the admission concerned; or
 - (b) in respect of the other party's case against the party who adduced the evidence in that way.
- (4) A party may adduce evidence of the contents of a document in question that is not available to the party, or the existence and contents of which are not in issue in the proceeding, by—
- (a) tendering a document that is a copy of, or an extract from or summary of, the document in question; or
 - (b) adducing from a witness evidence of the contents of the document in question.

Notes

- 1 Clause 5 of Part 2 of the Dictionary is about the availability of documents.
- 2 Section 182 of the Commonwealth Act gives section 48 of the Commonwealth Act a wider application in relation to Commonwealth records and certain Commonwealth documents.

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PART 3.1—RELEVANCE

55 Relevant evidence

- (1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.
- (2) In particular, evidence is not taken to be irrelevant only because it relates only to—
 - (a) the credibility of a witness; or
 - (b) the admissibility of other evidence; or
 - (c) a failure to adduce evidence.

56 Relevant evidence to be admissible

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

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PART 3.2—HEARSAY

Division 1—The hearsay rule

59 The hearsay rule—exclusion of hearsay evidence

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

- (2) Such a fact is in this Part referred to as an *asserted fact*.
- (2A) For the purposes of determining under subsection (1) whether it can reasonably be supposed that the person intended to assert a particular fact by the representation, the court may have regard to the circumstances in which the representation was made.

Note

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

Notes

- 1 The Commonwealth Act and New South Wales Act include another subsection.
- 2 Specific exceptions to the hearsay rule are as follows—
 - evidence relevant for a non-hearsay purpose (section 60)
 - first-hand hearsay—
 - civil proceedings, if the maker of the representation is unavailable (section 63) or available (section 64)
 - criminal proceedings, if the maker of the representation is unavailable (section 65) or available (section 66)
 - contemporaneous statements about a person's health etc. (section 66A)
 - business records (section 69)
 - tags and labels (section 70)
 - electronic communications (section 71)
 - Aboriginal and Torres Strait Islander traditional laws and customs (section 72)
 - marriage, family history or family relationships (section 73)
 - public or general rights (section 74)
 - use of evidence in interlocutory proceedings (section 75)
 - admissions (section 81)
 - representations about employment or authority (section 87(2))
 - exceptions to the rule excluding evidence of judgments and convictions (section 92(3))
 - character of and expert opinion about an accused (sections 110 and 111).

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

Examples

- 1 D is the accused in a sexual assault trial. W has made a statement to the police that X told W that X had seen D leave a night club with the victim shortly before the sexual assault is alleged to have occurred. Unless an exception to the hearsay rule applies, evidence of what X told W cannot be given at the trial.
- 2 P had told W that the handbrake on W's car did not work. Unless an exception to the hearsay rule applies, evidence of that statement cannot be given by P, W or anyone else to prove that the handbrake was defective.
- 3 W had bought a video cassette recorder and written down its serial number on a document. Unless an exception to the hearsay rule applies, the document is inadmissible to prove that a video cassette recorder later found in D's possession was the video cassette recorder bought by W.

60 Exception—evidence relevant for a non-hearsay purpose

- (1) The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of an asserted fact.
- (2) This section applies whether or not the person who made the representation had personal knowledge of the asserted fact (within the meaning of section 62(2)).

Note

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

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

Note

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

61 Exceptions to the hearsay rule dependant on competency

- (1) This Part does not enable use of a previous representation to prove the existence of an asserted fact if, when the representation was made, the person who made it was not competent to give evidence about the fact because of section 13(1).
- (2) This section does not apply to a contemporaneous representation made by a person about his or her health, feelings, sensations, intention, knowledge or state of mind.

Note

For the admissibility of such contemporaneous representations, see section 66A.

- (3) For the purposes of this section, it is presumed, unless the contrary is proved, that when the representation was made the person who made it was competent to give evidence about the asserted fact.

Division 2—"First-hand" hearsay

62 Restriction to "first-hand" hearsay

- (1) A reference in this Division (other than in subsection (2)) to a previous representation is a reference to a previous representation that was made by a person who had personal knowledge of an asserted fact.
- (2) A person has personal knowledge of the asserted fact if his or her knowledge of the fact was, or might reasonably be supposed to have been, based on something that the person saw, heard or otherwise perceived, other than a previous representation made by another person about the fact.
- (3) For the purposes of section 66A, a person has personal knowledge of the asserted fact if it is a fact about the person's health, feelings, sensations, intention, knowledge or state of mind at the time the representation referred to in that section was made.

63 Exception—civil proceedings if maker not available

- (1) This section applies in a civil proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.
- (2) The hearsay rule does not apply to—
 - (a) evidence of the representation that is given by a person who saw, heard or otherwise perceived the representation being made; or
 - (b) a document so far as it contains the representation, or another representation to which it is reasonably necessary to refer in order to understand the representation.

Notes

- 1 Section 67 imposes notice requirements relating to this subsection.
- 2 Clause 4 of Part 2 of the Dictionary is about the availability of persons.

64 Exception—civil proceedings if maker available

- (1) This section applies in a civil proceeding if a person who made a previous representation is available to give evidence about an asserted fact.
- (2) The hearsay rule does not apply to—
 - (a) evidence of the representation that is given by a person who saw, heard or otherwise perceived the representation being made; or
 - (b) a document so far as it contains the representation, or another representation to which it is reasonably necessary to refer in order to understand the representation—

if it would cause undue expense or undue delay, or would not be reasonably practicable, to call the person who made the representation to give evidence.

Note

Section 67 imposes notice requirements relating to this subsection.
Section 68 is about objections to notices that relate to this subsection.

- (3) If the person who made the representation has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by—
 - (a) that person; or
 - (b) a person who saw, heard or otherwise perceived the representation being made.
- (4) A document containing a representation to which subsection (3) applies must not be tendered before the conclusion of the examination in chief of the person who made the representation, unless the court gives leave.

Note

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

65 Exception—criminal proceedings if maker not available

- (1) This section applies in a criminal proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.
- (2) The hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation—
 - (a) was made under a duty to make that representation or to make representations of that kind; or
 - (b) was made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication; or
 - (c) was made in circumstances that make it highly probable that the representation is reliable; or
 - (d) was—
 - (i) against the interests of the person who made it at the time it was made; and
 - (ii) made in circumstances that make it likely that the representation is reliable.

Note

Section 67 imposes notice requirements relating to this subsection.

- (3) The hearsay rule does not apply to evidence of a previous representation made in the course of giving evidence in an Australian or overseas proceeding if, in that proceeding, the accused in the proceeding to which this section is being applied—
 - (a) cross-examined the person who made the representation about it;
or

- (b) had a reasonable opportunity to cross-examine the person who made the representation about it.

Note

Section 67 imposes notice requirements relating to this subsection.

- (4) If there is more than one accused in the criminal proceeding, evidence of a previous representation that—
 - (a) is given in an Australian or overseas proceeding; and
 - (b) is admitted into evidence in the criminal proceeding because of subsection (3)—cannot be used against an accused who did not cross-examine, and did not have a reasonable opportunity to cross-examine, the person about the representation.
- (5) For the purposes of subsections (3) and (4), an accused is taken to have had a reasonable opportunity to cross-examine a person if the accused was not present at a time when the cross-examination of a person might have been conducted but—
 - (a) could reasonably have been present at that time; and
 - (b) if present could have cross-examined the person.
- (6) Evidence of the making of a representation to which subsection (3) applies may be adduced by producing a transcript, or a recording, of the representation that is authenticated by—
 - (a) the person to whom, or the court or other body to which, the representation was made; or
 - (b) if applicable, the registrar or other proper officer of the court or other body to which the representation was made; or
 - (c) the person or body responsible for producing the transcript or recording.
- (7) Without limiting subsection (2)(d), a representation is taken for the purposes of that subsection to be against the interests of the person who made it if it tends—
 - (a) to damage the person's reputation; or
 - (b) to show that the person has committed an offence for which the person has not been convicted; or
 - (c) to show that the person is liable in an action for damages.
- (8) The hearsay rule does not apply to—
 - (a) evidence of a previous representation adduced by an accused if the evidence is given by a person who saw, heard or otherwise perceived the representation being made; or
 - (b) a document tendered as evidence by an accused so far as it contains a previous representation, or another representation to

which it is reasonably necessary to refer in order to understand the representation.

Note

Section 67 imposes notice requirements relating to this subsection.

- (9) If evidence of a previous representation about a matter has been adduced by an accused and has been admitted, the hearsay rule does not apply to evidence of another representation about the matter that—
- (a) is adduced by another party; and
 - (b) is given by a person who saw, heard or otherwise perceived the other representation being made.

Note

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

66 Exception—criminal proceedings if maker available

- (1) This section applies in a criminal proceeding if a person who made a previous representation is available to give evidence about an asserted fact.
- (2) The hearsay rule does not apply to evidence of the representation that is given by the person who made the representation or a person who saw, heard or otherwise perceived the representation being made if—
- (a) the person who made the representation has been or is to be called to give evidence; and
 - (b) either—
 - (i) when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation; or
 - (ii) the person who made the representation is a victim of an offence to which the proceeding relates and was under the age of 18 years when the representation was made.

Note

Subsection (2) differs from the Commonwealth Act and New South Wales Act.

- (2A) In determining whether the occurrence of the asserted fact was fresh in the memory of a person, the court may take into account all matters that it considers are relevant to the question, including—
- (a) the nature of the event concerned; and
 - (b) the age and health of the person; and
 - (c) the period of time between the occurrence of the asserted fact and the making of the representation.

Note

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

- (3) If a representation was made for the purpose of indicating the evidence that the person who made it would be able to give in an Australian or overseas proceeding, subsection (2) does not apply to evidence adduced by the prosecutor of the representation unless the representation concerns the identity of a person, place or thing.
- (4) A document containing a representation to which subsection (2) applies must not be tendered before the conclusion of the examination in chief of the person who made the representation, unless the court gives leave.

Note

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

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

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

67 Notice to be given

- (1) Sections 63(2), 64(2) and 65(2), (3) and (8) do not apply to evidence adduced by a party unless that party has given reasonable notice in writing to each other party of the party's intention to adduce the evidence.
- (2) Notices given under subsection (1) are to be given in accordance with any regulations or rules of court made for the purposes of this section.
- (3) The notice must state—
 - (a) the particular provisions of this Division on which the party intends to rely in arguing that the hearsay rule does not apply to the evidence; and
 - (b) if section 64(2) is such a provision—the grounds, specified in that provision, on which the party intends to rely.
- (4) Despite subsection (1), if notice has not been given, the court may, on the application of a party, direct that one or more of those subsections is to apply despite the party's failure to give notice.
- (5) The direction—
 - (a) is subject to such conditions (if any) as the court thinks fit; and
 - (b) in particular, may provide that, in relation to specified evidence, the subsection or subsections concerned apply with such modifications as the court specifies.

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

- (1) In a civil proceeding, if the notice discloses that it is not intended to call the person who made the previous representation concerned because it—
 - (a) would cause undue expense or undue delay; or
 - (b) would not be reasonably practicable—
 a party may, not later than 21 days after notice has been given, object to the tender of the evidence, or of a specified part of the evidence.
- (2) The objection is to be made by giving to each other party a written notice setting out the grounds on which the objection is made.
- (3) The court may, on the application of a party, determine the objection at or before the hearing.
- (4) If the objection is unreasonable, the court may order that, in any event, the party objecting is to bear the costs incurred by another party—
 - (a) in relation to the objection; and
 - (b) in calling the person who made the representation to give evidence.

Note

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

Division 3—Other exceptions to the hearsay rule

69 Exception—business records

- (1) This section applies to a document that—
 - (a) either—
 - (i) is or forms part of the records belonging to or kept by a person, body or organisation in the course of, or for the purposes of, a business; or
 - (ii) at any time was or formed part of such a record; and
 - (b) contains a previous representation made or recorded in the document in the course of, or for the purposes of, the business.
- (2) The hearsay rule does not apply to the document (so far as it contains the representation) if the representation was made—
 - (a) by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact; or
 - (b) on the basis of information directly or indirectly supplied by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact.
- (3) Subsection (2) does not apply if the representation—
 - (a) was prepared or obtained for the purpose of conducting, or for or in contemplation of or in connection with, an Australian or overseas proceeding; or

- (b) was made in connection with an investigation relating or leading to a criminal proceeding.
- (4) If—
- (a) the occurrence of an event of a particular kind is in question; and
 - (b) in the course of a business, a system has been followed of making and keeping a record of the occurrence of all events of that kind—
- the hearsay rule does not apply to evidence that tends to prove that there is no record kept, in accordance with that system, of the occurrence of the event.
- (5) For the purposes of this section, a person is taken to have had personal knowledge of a fact if the person's knowledge of the fact was or might reasonably be supposed to have been based on what the person saw, heard or otherwise perceived (other than a previous representation made by a person about the fact).

Note

- 1 Sections 48, 49, 50, 146, 147 and 150(1) are relevant to the mode of proof, and authentication, of business records.
- 2 Section 182 of the Commonwealth Act gives section 69 of the Commonwealth Act a wider application in relation to Commonwealth records.

70 Exception—contents of tags, labels and writing

The hearsay rule does not apply to a tag or label attached to, or writing placed on, an object (including a document) if the tag or label or writing may reasonably be supposed to have been so attached or placed—

- (a) in the course of a business; and
- (b) for the purpose of describing or stating the identity, nature, ownership, destination, origin or weight of the object, or of the contents (if any) of the object.

Note

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

71 Exception—electronic communications

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

- (a) the identity of the person from whom or on whose behalf the communication was sent; or
- (b) the date on which or the time at which the communication was sent; or

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

Notes

- 1 Division 3 of Part 4.3 contains presumptions about electronic communications.
- 2 Section 182 of the Commonwealth Act gives section 71 of the Commonwealth Act a wider application in relation to Commonwealth records.
- 3 *Electronic communication* is defined in the Dictionary.

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

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

Note

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

73 Exception—reputation as to relationships and age

- (1) The hearsay rule does not apply to evidence of reputation concerning—
 - (a) whether a person was, at a particular time or at any time, a married person; or
 - (b) whether a man and a woman cohabiting at a particular time were married to each other at that time; or
 - (c) a person's age; or
 - (d) family history or a family relationship.
- (2) In a criminal proceeding, subsection (1) does not apply to evidence adduced by an accused unless—
 - (a) it tends to contradict evidence of a kind referred to in subsection (1) that has been admitted; or
 - (b) the accused has given reasonable notice in writing to each other party of the intention of the accused to adduce the evidence.
- (3) In a criminal proceeding, subsection (1) does not apply to evidence adduced by the prosecutor unless it tends to contradict evidence of a kind referred to in subsection (1) that has been admitted.

74 Exception—reputation of public or general rights

- (1) The hearsay rule does not apply to evidence of reputation concerning the existence, nature or extent of a public or general right.
- (2) In a criminal proceeding, subsection (1) does not apply to evidence adduced by the prosecutor unless it tends to contradict evidence of a kind referred to in subsection (1) that has been admitted.

75 Exception—interlocutory proceedings

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

PART 3.3—OPINION

76 The opinion rule

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

Notes

- 1 The Commonwealth Act and New South Wales Act include an additional subsection.
- 2 Specific exceptions to the opinion rule are as follows—
 - summaries of voluminous or complex documents (section 50(3))
 - evidence relevant otherwise than as opinion evidence (section 77)
 - lay opinion (section 78)
 - Aboriginal and Torres Strait Islander traditional laws and customs (section 78A)
 - expert opinion (section 79)
 - admissions (section 81)
 - exceptions to the rule excluding evidence of judgments and convictions (section 92(3))
 - character of and expert opinion about an accused (sections 110 and 111).

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

Examples

- 1 P sues D, her doctor, for the negligent performance of a surgical operation. Unless an exception to the opinion rule applies, P's neighbour, W, who had the same operation, cannot give evidence of his opinion that D had not performed the operation as well as his own.
- 2 P considers that electrical work that D, an electrician, has done for her is unsatisfactory. Unless an exception to the opinion rule applies, P cannot give evidence of her opinion that D does not have the necessary skills to do electrical work.

77 Exception—evidence relevant otherwise than as opinion evidence

The opinion rule does not apply to evidence of an opinion that is admitted because it is relevant for a purpose other than proof of the existence of a fact about the existence of which the opinion was expressed.

78 Exception—lay opinions

The opinion rule does not apply to evidence of an opinion expressed by a person if—

- (a) the opinion is based on what the person saw, heard or otherwise perceived about a matter or event; and
- (b) evidence of the opinion is necessary to obtain an adequate account or understanding of the person's perception of the matter or event.

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

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

79 Exception—opinions based on specialised knowledge

- (1) If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.
- (2) To avoid doubt, and without limiting subsection (1)—
 - (a) a reference in that subsection to specialised knowledge includes a reference to specialised knowledge of child development and child behaviour (including specialised knowledge of the impact of sexual abuse on children and their development and behaviour during and following the abuse); and
 - (b) a reference in that subsection to an opinion of a person includes, if the person has specialised knowledge of the kind referred to in paragraph (a), a reference to an opinion relating to either or both of the following—
 - (i) the development and behaviour of children generally;
 - (ii) the development and behaviour of children who have been victims of sexual offences, or offences similar to sexual offences.

80 Ultimate issue and common knowledge rules abolished

Evidence of an opinion is not inadmissible only because it is about—

- (a) a fact in issue or an ultimate issue; or
- (b) a matter of common knowledge.

PART 3.4—ADMISSIONS

Note

Admission is defined in the Dictionary.

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

- (1) The hearsay rule and the opinion rule do not apply to evidence of an admission.
- (2) The hearsay rule and the opinion rule do not apply to evidence of a previous representation—
 - (a) that was made in relation to an admission at the time the admission was made, or shortly before or after that time; and
 - (b) to which it is reasonably necessary to refer in order to understand the admission.

Note

Specific exclusionary rules relating to admissions are as follows—

- evidence of admissions that is not first-hand (section 82)
- use of admissions against third parties (section 83)
- admissions influenced by violence and certain other conduct (section 84)
- unreliable admissions of an accused (section 85)
- records of oral questioning of an accused (section 86)

Example

D admits to W, his best friend, that he sexually assaulted V. In D's trial for the sexual assault, the prosecution may lead evidence from W—

- (a) that D made the admission to W as proof of the truth of that admission; and
- (b) that W formed the opinion that D was sane when he made the admission.

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

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

- (a) it is given by a person who saw, heard or otherwise perceived the admission being made; or
- (b) it is a document in which the admission is made.

Note

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

83 Exclusion of evidence of admissions as against third parties

- (1) Section 81 does not prevent the application of the hearsay rule or the opinion rule to evidence of an admission in respect of the case of a third party.

- (2) The evidence may be used in respect of the case of a third party if that party consents.
- (3) Consent cannot be given in respect of part only of the evidence.
- (4) In this section, *third party* means a party to the proceeding concerned, other than the party who—
 - (a) made the admission; or
 - (b) adduced the evidence.

84 Exclusion of admissions influenced by violence and certain other conduct

- (1) Evidence of an admission is not admissible unless the court is satisfied that the admission, and the making of the admission, were not influenced by—
 - (a) violent, oppressive, inhuman or degrading conduct, whether towards the person who made the admission or towards another person; or
 - (b) a threat of conduct of that kind.
- (2) Subsection (1) only applies if the party against whom evidence of the admission is adduced has raised in the proceeding an issue about whether the admission or its making were so influenced.

85 Criminal proceedings—reliability of admissions by accused

- (1) This section applies only in a criminal proceeding and only to evidence of an admission made by an accused—
 - (a) to, or in the presence of, an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence; or
 - (b) as a result of an act of another person who was, and who the accused knew or reasonably believed to be, capable of influencing the decision whether a prosecution of the accused should be brought or should be continued.

Note

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

- (2) Evidence of the admission is not admissible unless the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected.
- (3) Without limiting the matters that the court may take into account for the purposes of subsection (2), it is to take into account—
 - (a) any relevant condition or characteristic of the person who made the admission, including age, personality and education and any mental, intellectual or physical disability to which the person is or appears to be subject; and

- (b) if the admission was made in response to questioning—
 - (i) the nature of the questions and the manner in which they were put; and
 - (ii) the nature of any threat, promise or other inducement made to the person questioned.

86 Exclusion of records of oral questioning

- (1) This section applies only in a criminal proceeding and only if an oral admission was made by an accused to an investigating official in response to a question put or a representation made by the official.
- (2) A document prepared by or on behalf of the official is not admissible to prove the contents of the question, representation or response unless the accused has acknowledged that the document is a true record of the question, representation or response.
- (3) The acknowledgement must be made by signing, initialling or otherwise marking the document.
- (4) In this section, *document* does not include—
 - (a) a sound recording, or a transcript of a sound recording; or
 - (b) a recording of visual images and sounds, or a transcript of the sounds so recorded.

Note

See also sections 83 and 84 of the **Criminal Procedure Act 2009** which relate to the admissibility of evidence in the absence of an accused in a summary hearing.

87 Admissions made with authority

- (1) For the purpose of determining whether a previous representation made by a person is also taken to be an admission by a party, the court is to admit the representation if it is reasonably open to find that—
 - (a) when the representation was made, the person had authority to make statements on behalf of the party in relation to the matter with respect to which the representation was made; or
 - (b) when the representation was made, the person was an employee of the party, or had authority otherwise to act for the party, and the representation related to a matter within the scope of the person's employment or authority; or
 - (c) the representation was made by the person in furtherance of a common purpose (whether lawful or not) that the person had with the party or one or more persons including the party.
- (2) For the purposes of this section, the hearsay rule does not apply to a previous representation made by a person that tends to prove—
 - (a) that the person had authority to make statements on behalf of another person in relation to a matter; or

- (b) that the person was an employee of another person or had authority otherwise to act for another person; or
- (c) the scope of the person's employment or authority.

88 Proof of admissions

For the purpose of determining whether evidence of an admission is admissible, the court is to find that a particular person made the admission if it is reasonably open to find that he or she made the admission.

89 Evidence of silence

- (1) In a criminal proceeding, an inference unfavourable to a party must not be drawn from evidence that the party or another person failed or refused—

- (a) to answer one or more questions; or
- (b) to respond to a representation—

put or made to the party or other person by an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence.

- (2) Evidence of that kind is not admissible if it can only be used to draw such an inference.
- (3) Subsection (1) does not prevent use of the evidence to prove that the party or other person failed or refused to answer the question or to respond to the representation if the failure or refusal is a fact in issue in the proceeding.
- (4) In this section, *inference* includes—
 - (a) an inference of consciousness of guilt; or
 - (b) an inference relevant to a party's credibility.

90 Discretion to exclude admissions

In a criminal proceeding, the court may refuse to admit evidence of an admission, or refuse to admit the evidence to prove a particular fact, if—

- (a) the evidence is adduced by the prosecution; and
- (b) having regard to the circumstances in which the admission was made, it would be unfair to an accused to use the evidence.

Note

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

PART 3.6—TENDENCY AND COINCIDENCE

94 Application

- (1) This Part does not apply to evidence that relates only to the credibility of a witness.
- (2) This Part does not apply so far as a proceeding relates to bail or sentencing.
- (3) This Part does not apply to evidence of—
 - (a) the character, reputation or conduct of a person; or
 - (b) a tendency that a person has or had—if that character, reputation, conduct or tendency is a fact in issue.

95 Use of evidence for other purposes

- (1) Evidence that under this Part is not admissible to prove a particular matter must not be used to prove that matter even if it is relevant for another purpose.
- (2) Evidence that under this Part cannot be used against a party to prove a particular matter must not be used against the party to prove that matter even if it is relevant for another purpose.

96 Failure to act

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

97 The tendency rule

- (1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind unless—
 - (a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence; and
 - (b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.
- (2) Subsection (1)(a) does not apply if—
 - (a) the evidence is adduced in accordance with any directions made by the court under section 100; or
 - (b) the evidence is adduced to explain or contradict tendency evidence adduced by another party.

Note

The tendency rule is subject to specific exceptions concerning character of and expert opinion about an accused (sections 110 and 111). Other provisions of this Act, or of other laws, may operate as further exceptions.

98 The coincidence rule

- (1) Evidence that 2 or more events occurred is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally unless—
 - (a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence; and
 - (b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

Note

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

- (2) Subsection (1)(a) does not apply if—
 - (a) the evidence is adduced in accordance with any directions made by the court under section 100; or
 - (b) the evidence is adduced to explain or contradict coincidence evidence adduced by another party.

Note

Other provisions of this Act, or of other laws, may operate as exceptions to the coincidence rule.

99 Requirements for notices

Notices given under section 97 or 98 are to be given in accordance with any regulations or rules of court made for the purposes of this section.

100 Court may dispense with notice requirements

- (1) The court may, on the application of a party, direct that the tendency rule is not to apply to particular tendency evidence despite the party's failure to give notice under section 97.
- (2) The court may, on the application of a party, direct that the coincidence rule is not to apply to particular coincidence evidence despite the party's failure to give notice under section 98.
- (3) The application may be made either before or after the time by which the party would, apart from this section, be required to give, or to have given, the notice.
- (4) In a civil proceeding, the party's application may be made without notice of it having been given to one or more of the other parties.
- (5) The direction—
 - (a) is subject to such conditions (if any) as the court thinks fit; and
 - (b) may be given either at or before the hearing.

- (6) Without limiting the court's power to impose conditions under this section, those conditions may include one or more of the following—
- (a) a condition that the party give notice of its intention to adduce the evidence to a specified party, or to each other party other than a specified party;
 - (b) a condition that the party give such notice only in respect of specified tendency evidence, or all tendency evidence that the party intends to adduce other than specified tendency evidence;
 - (c) a condition that the party give such notice only in respect of specified coincidence evidence, or all coincidence evidence that the party intends to adduce other than specified coincidence evidence.

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

- (1) This section only applies in a criminal proceeding and so applies in addition to sections 97 and 98.
- (2) Tendency evidence about an accused, or coincidence evidence about an accused, that is adduced by the prosecution cannot be used against the accused unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the accused.
- (3) This section does not apply to tendency evidence that the prosecution adduces to explain or contradict tendency evidence adduced by the accused.
- (4) This section does not apply to coincidence evidence that the prosecution adduces to explain or contradict coincidence evidence adduced by the accused.

PART 3.7—CREDIBILITY

Division 1—Credibility evidence

101A Credibility evidence

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

- (a) is relevant only because it affects the assessment of the credibility of the witness or person; or
- (b) is relevant—
 - (i) because it affects the assessment of the credibility of the witness or person; and
 - (ii) for some other purpose for which it is not admissible, or cannot be used, because of a provision of Parts 3.2 to 3.6.

Notes

- 1 Sections 60 and 77 will not affect the application of paragraph (b), because they cannot apply to evidence that is yet to be admitted.
- 2 Section 101A was inserted as a response to the decision of the High Court of Australia in *Adam v The Queen* (2001) 207 CLR 96.

Division 2—Credibility of witnesses

102 The credibility rule

Credibility evidence about a witness is not admissible.

Notes

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

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

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

103 Exception—cross-examination as to credibility

- (1) The credibility rule does not apply to evidence adduced in cross-examination of a witness if the evidence could substantially affect the assessment of the credibility of the witness.
- (2) Without limiting the matters to which the court may have regard for the purposes of subsection (1), it is to have regard to—
 - (a) whether the evidence tends to prove that the witness knowingly or recklessly made a false representation when the witness was under an obligation to tell the truth; and
 - (b) the period that has elapsed since the acts or events to which the evidence relates were done or occurred.

104 Further protections—cross-examination as to credibility

- (1) This section applies only to credibility evidence in a criminal proceeding and so applies in addition to section 103.
- (2) An accused must not be cross-examined about a matter that is relevant to the assessment of the credibility of the accused, unless the court gives leave.
- (3) Despite subsection (2), leave is not required for cross-examination by the prosecutor about whether the accused—
 - (a) is biased or has a motive to be untruthful; or

- (b) is, or was, unable to be aware of or recall matters to which his or her evidence relates; or
 - (c) has made a prior inconsistent statement.
- (4) Leave must not be given for cross-examination by the prosecutor under subsection (2) unless evidence adduced by the accused has been admitted that—
- (a) tends to prove that a witness called by the prosecutor has a tendency to be untruthful; and
 - (b) is relevant solely or mainly to the witness's credibility.
- (5) A reference in subsection (4) to evidence does not include a reference to evidence of conduct in relation to—
- (a) the events in relation to which the accused is being prosecuted; or
 - (b) the investigation of the offence for which the accused is being prosecuted.
- (6) Leave is not to be given for cross-examination by another accused unless—
- (a) the evidence that the accused to be cross-examined has given includes evidence adverse to the accused seeking leave to cross-examine; and
 - (b) that evidence has been admitted.
- ...

106 Exception—rebutting denials by other evidence

- (1) The credibility rule does not apply to evidence that is relevant to a witness's credibility and that is adduced otherwise than from the witness if—
- (a) in cross-examination of the witness—
 - (i) the substance of the evidence was put to the witness; and
 - (ii) the witness denied, or did not admit or agree to, the substance of the evidence; and
 - (b) the court gives leave to adduce the evidence.
- (2) Leave under subsection (1)(b) is not required if the evidence tends to prove that the witness—
- (a) is biased or has a motive for being untruthful; or
 - (b) has been convicted of an offence, including an offence against the law of a foreign country; or
 - (c) has made a prior inconsistent statement; or
 - (d) is, or was, unable to be aware of matters to which his or her evidence relates; or

- (e) has knowingly or recklessly made a false representation while under an obligation, imposed by or under an Australian law or a law of a foreign country, to tell the truth.

...

108 Exception—re-establishing credibility

- (1) The credibility rule does not apply to evidence adduced in re-examination of a witness.
- (2) * * * * *

Note

The Commonwealth Act previously included a subsection referring to section 105 of that Act.

- (3) The credibility rule does not apply to evidence of a prior consistent statement of a witness if—
 - (a) evidence of a prior inconsistent statement of the witness has been admitted; or
 - (b) it is or will be suggested (either expressly or by implication) that evidence given by the witness has been fabricated or re-constructed (whether deliberately or otherwise) or is the result of a suggestion—

and the court gives leave to adduce the evidence of the prior consistent statement.

PART 3.8—CHARACTER

109 Application

This Part applies only in a criminal proceeding.

110 Evidence about character of an accused

- (1) The hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced by an accused to prove (directly or by implication) that the accused is, either generally or in a particular respect, a person of good character.
- (2) If evidence adduced to prove (directly or by implication) that an accused is generally a person of good character has been admitted, the hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced to prove (directly or by implication) that the accused is not generally a person of good character.
- (3) If evidence adduced to prove (directly or by implication) that an accused is a person of good character in a particular respect has been admitted, the hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced to prove (directly or by implication) that the accused is not a person of good character in that respect.

Note

The Commonwealth Act previously included an additional subsection relating to unsworn statements.

111 Evidence about character of co-accused

- (1) The hearsay rule and the tendency rule do not apply to evidence of the character of an accused if—
 - (a) the evidence is evidence of an opinion about the accused adduced by another accused; and
 - (b) the person whose opinion it is has specialised knowledge based on the person's training, study or experience; and
 - (c) the opinion is wholly or substantially based on that knowledge.
- (2) If such evidence has been admitted, the hearsay rule, the opinion rule and the tendency rule do not apply to evidence adduced to prove that that evidence should not be accepted.

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

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

PART 3.9—IDENTIFICATION EVIDENCE

Note

Identification evidence is defined in the Dictionary.

113 Application of Part

This Part applies only in a criminal proceeding.

114 Exclusion of visual identification evidence

- (1) In this section, *visual identification evidence* means identification evidence relating to an identification based wholly or partly on what a person saw but does not include picture identification evidence.
- (2) Visual identification evidence adduced by the prosecutor is not admissible unless—
 - (a) an identification parade that included the accused was held before the identification was made; or
 - (b) it would not have been reasonable to have held such a parade; or
 - (c) the accused refused to take part in such a parade—
and the identification was made without the person who made it having been intentionally influenced to identify the accused.
- (3) Without limiting the matters that may be taken into account by the court in determining whether it was reasonable to hold an identification parade, it is to take into account—
 - (a) the kind of offence, and the gravity of the offence, concerned; and

- (b) the importance of the evidence; and
 - (c) the practicality of holding an identification parade having regard, among other things—
 - (i) if the accused failed to cooperate in the conduct of the parade—to the manner and extent of, and the reason (if any) for, the failure; and
 - (ii) in any case—to whether the identification was made at or about the time of the commission of the offence; and
 - (d) the appropriateness of holding an identification parade having regard, among other things, to the relationship (if any) between the accused and the person who made the identification.
- (4) It is presumed that it would not have been reasonable to have held an identification parade if it would have been unfair to the accused for such a parade to have been held.
- (5) If—
- (a) the accused refused to take part in an identification parade unless an Australian legal practitioner acting for the accused, or another person chosen by the accused, was present while it was being held; and
 - (b) there were, at the time when the parade was to have been conducted, reasonable grounds to believe that it was not reasonably practicable for such an Australian legal practitioner or person to be present—
- it is presumed that it would not have been reasonable to have held an identification parade at that time.
- (6) In determining whether it was reasonable to have held an identification parade, the court is not to take into account the availability of pictures or photographs that could be used in making identifications.

115 Exclusion of evidence of identification by pictures

- (1) In this section, *picture identification evidence* means identification evidence relating to an identification made wholly or partly by the person who made the identification examining pictures kept for the use of police officers.
- (2) Picture identification evidence adduced by the prosecutor is not admissible if the pictures examined suggest that they are pictures of persons in police custody.
- (3) Subject to subsection (4), picture identification evidence adduced by the prosecutor is not admissible if—
 - (a) when the pictures were examined, the accused was in the custody of a police officer of the police force investigating the commission of the offence with which the accused has been charged; and
 - (b) the picture of the accused that was examined was made before the accused was taken into that police custody.

- (4) Subsection (3) does not apply if—
- (a) the appearance of the accused had changed significantly between the time when the offence was committed and the time when the accused was taken into that custody; or
 - (b) it was not reasonably practicable to make a picture of the accused after the accused was taken into that custody.
- (5) Picture identification evidence adduced by the prosecutor is not admissible if, when the pictures were examined, the accused was in the custody of a police officer of the police force investigating the commission of the offence with which the accused has been charged, unless—
- (a) the accused refused to take part in an identification parade; or
 - (b) the appearance of the accused had changed significantly between the time when the offence was committed and the time when the accused was taken into that custody; or
 - (c) it would not have been reasonable to have held an identification parade that included the accused.
- (6) Sections 114(3), (4), (5) and (6) apply in determining, for the purposes of subsection (5)(c) of this section, whether it would have been reasonable to have held an identification parade.
- (7) If picture identification evidence adduced by the prosecutor is admitted into evidence, the judge must, on the request of the accused—
- (a) if the picture of the accused was made after the accused was taken into that custody—inform the jury that the picture was made after the accused was taken into that custody; or
 - (b) otherwise—warn the jury that they must not assume that the accused has a criminal record or has previously been charged with an offence.

Note

Division 4 of Part 4 of the **Jury Directions Act 2015** also deals with warnings about identification evidence.

- (8) This section does not render inadmissible picture identification evidence adduced by the prosecutor that contradicts or qualifies picture identification evidence adduced by the accused.
- (9) This section applies in addition to section 114.
- (10) In this section—
- (a) a reference to a picture includes a reference to a photograph; and
 - (b) a reference to making a picture includes a reference to taking a photograph.

...

PART 3.10—PRIVILEGES

Division 1—Client legal privilege

117 Definitions

(1) In this Division—

client includes the following—

- (a) a person or body who engages a lawyer to provide legal services or who employs a lawyer (including under a contract of service);
- (b) an employee or agent of a client;
- (c) an employer of a lawyer if the employer is—
 - (i) the Commonwealth or a State or Territory; or
 - (ii) a body established by a law of the Commonwealth or a State or Territory;
- (d) if, under a law of a State or Territory relating to persons of unsound mind, a manager, committee or person (however described) is for the time being acting in respect of the person, estate or property of a client—a manager, committee or person so acting;
- (e) if a client has died—a personal representative of the client;
- (f) a successor to the rights and obligations of a client, being rights and obligations in respect of which a confidential communication was made;

confidential communication means a communication made in such circumstances that, when it was made—

- (a) the person who made it; or
- (b) the person to whom it was made—

was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law;

confidential document means a document prepared in such circumstances that, when it was prepared—

- (a) the person who prepared it; or
- (b) the person for whom it was prepared—

was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law;

lawyer means—

- (a) an Australian lawyer; and
- (b) a non-participant registered foreign lawyer; and

- (c) a foreign lawyer or a natural person who, under the law of a foreign country, is permitted to engage in legal practice in that country; and
- (d) an employee or agent of a lawyer referred to in paragraph (a), (b) or (c);

party includes the following—

- (a) an employee or agent of a party;
 - (b) if, under a law of a State or Territory relating to persons of unsound mind, a manager, committee or person (however described) is for the time being acting in respect of the person, estate or property of a party—a manager, committee or person so acting;
 - (c) if a party has died—a personal representative of the party;
 - (d) a successor to the rights and obligations of a party, being rights and obligations in respect of which a confidential communication was made.
- (2) A reference in this Division to the commission of an act includes a reference to a failure to act.

118 Legal advice

Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of—

- (a) a confidential communication made between the client and a lawyer; or
- (b) a confidential communication made between 2 or more lawyers acting for the client; or
- (c) the contents of a confidential document (whether delivered or not) prepared by the client, lawyer or another person—

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

119 Litigation

Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of—

- (a) a confidential communication between the client and another person, or between a lawyer acting for the client and another person, that was made; or
- (b) the contents of a confidential document (whether delivered or not) that was prepared—

for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.

120 Unrepresented parties

- (1) Evidence is not to be adduced if, on objection by a party who is not represented in the proceeding by a lawyer, the court finds that adducing the evidence would result in disclosure of—
 - (a) a confidential communication between the party and another person; or
 - (b) the contents of a confidential document (whether delivered or not) that was prepared, either by or at the direction or request of, the party—

for the dominant purpose of preparing for or conducting the proceeding.

- (2) * * * * *

121 Loss of client legal privilege—generally

- (1) This Division does not prevent the adducing of evidence relevant to a question concerning the intentions, or competence in law, of a client or party who has died.
- (2) This Division does not prevent the adducing of evidence if, were the evidence not adduced, the court would be prevented, or it could reasonably be expected that the court would be prevented, from enforcing an order of an Australian court.
- (3) This Division does not prevent the adducing of evidence of a communication or document that affects a right of a person.

122 Loss of client legal privilege—consent and related matters

- (1) This Division does not prevent the adducing of evidence given with the consent of the client or party concerned.
- (2) Subject to subsection (5), this Division does not prevent the adducing of evidence if the client or party concerned has acted in a way that is inconsistent with the client or party objecting to the adducing of the evidence because it would result in a disclosure of a kind referred to in section 118, 119 or 120.
- (3) Without limiting subsection (2), a client or party is taken to have so acted if—
 - (a) the client or party knowingly and voluntarily disclosed the substance of the evidence to another person; or
 - (b) the substance of the evidence has been disclosed with the express or implied consent of the client or party.
- (4) The reference in subsection (3)(a) to a knowing and voluntary disclosure does not include a reference to a disclosure by a person who was, at the time of the disclosure, an employee or agent of the client or party or of a lawyer of the client or party unless the employee or agent was authorised by the client, party or lawyer to make the disclosure.
- (5) A client or party is not taken to have acted in a manner inconsistent with the client or party objecting to the adducing of the evidence merely because—

- (a) the substance of the evidence has been disclosed—
 - (i) in the course of making a confidential communication or preparing a confidential document; or
 - (ii) as a result of duress or deception; or
 - (iii) under compulsion of law; or
 - (iv) if the client or party is a body established by, or a person holding an office under, an Australian law—to the Minister, or the Minister of the Commonwealth, the State or Territory, administering the law, or part of the law, under which the body is established or the office is held; or
 - (b) of a disclosure by a client to another person if the disclosure concerns a matter in relation to which the same lawyer is providing, or is to provide, professional legal services to both the client and the other person; or
 - (c) of a disclosure to a person with whom the client or party had, at the time of the disclosure, a common interest relating to the proceeding or an anticipated or pending proceeding in an Australian court or a foreign court.
- (6) This Division does not prevent the adducing of evidence of a document that a witness has used to try to revive the witness's memory about a fact or opinion or has used as mentioned in section 32 (Attempts to revive memory in court) or 33 (Evidence given by police officers).

123 Loss of client legal privilege—accused

In a criminal proceeding, this Division does not prevent an accused from adducing evidence unless it is evidence of—

- (a) a confidential communication made between an associated accused and a lawyer acting for that person in connection with the prosecution of that person; or
- (b) the contents of a confidential document prepared by an associated accused or by a lawyer acting for that person in connection with the prosecution of that person.

Note

Associated accused is defined in the Dictionary.

124 Loss of client legal privilege—joint clients

- (1) This section only applies to a civil proceeding in connection with which 2 or more parties have, before the commencement of the proceeding, jointly retained a lawyer in relation to the same matter.
- (2) This Division does not prevent one of those parties from adducing evidence of—
 - (a) a communication made by any one of them to the lawyer; or

- (b) the contents of a confidential document prepared by or at the direction or request of any one of them—

in connection with that matter.

125 Loss of client legal privilege—misconduct

- (1) This Division does not prevent the adducing of evidence of—
 - (a) a communication made or the contents of a document prepared by a client or lawyer (or both), or a party who is not represented in the proceeding by a lawyer, in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty; or
 - (b) a communication or the contents of a document that the client or lawyer (or both), or the party, knew or ought reasonably to have known was made or prepared in furtherance of a deliberate abuse of a power.
- (2) For the purposes of this section, if the commission of the fraud, offence or act, or the abuse of power, is a fact in issue and there are reasonable grounds for finding that—
 - (a) the fraud, offence or act, or the abuse of power, was committed; and
 - (b) a communication was made or document prepared in furtherance of the commission of the fraud, offence or act or the abuse of power—

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

- (3) In this section, *power* means a power conferred by or under an Australian law.

126 Loss of client legal privilege—related communications and documents

If, because of the application of section 121, 122, 123, 124 or 125, this Division does not prevent the adducing of evidence of a communication or the contents of a document, those sections do not prevent the adducing of evidence of another communication or document if it is reasonably necessary to enable a proper understanding of the communication or document.

Example

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

Division 1A—Professional confidential relationship privilege

Note

The Commonwealth Act and New South Wales Act include this Division.

Division 1B—Sexual assault communications privilege

Note

The New South Wales Act includes this Division.

Division 1C—Journalist privilege

126J Definitions

(1) In this Division—

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

journalist means a person engaged in the profession or occupation of journalism in connection with the publication of information, comment, opinion or analysis in a news medium;

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

(2) For the purpose of the definition of journalist, in determining if a person is engaged in the profession or occupation of journalism regard must be had to the following factors—

(a) whether a significant proportion of the person's professional activity involves—

(i) the practice of collecting and preparing information having the character of news or current affairs; or

(ii) commenting or providing opinion on or analysis of news or current affairs—

for dissemination in a news medium;

(b) whether information, having the character of news or current affairs, collected and prepared by the person is regularly published in a news medium;

(c) whether the person's comments or opinion on or analysis of news or current affairs is regularly published in a news medium;

(d) whether, in respect of the publication of—

(i) any information collected or prepared by the person; or

(ii) any comment or opinion on or analysis of news or current affairs by the person—

the person or the publisher of the information, comment, opinion or analysis is accountable to comply (through a complaints process) with recognised journalistic or media professional standards or codes of practice.

126K Journalist privilege relating to identity of informant

- (1) If a journalist, in the course of the journalist's work, has promised an informant not to disclose the informant's identity, neither the journalist nor his or her employer is compellable to give evidence that would disclose the identity of the informant or enable that identity to be ascertained.
- (2) The court may, on the application of a party, order that subsection (1) is not to apply if it is satisfied that, having regard to the issues to be determined in the proceeding, the public interest in the disclosure of the identity of the informant outweighs—
 - (a) any likely adverse effect of the disclosure on the informant or any other person; and
 - (b) the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts.
- (3) An order under subsection (2) may be made subject to such terms and conditions (if any) as the court thinks fit.

Division 2—Other privileges

127 Religious confessions

- (1) A person who is or was a member of the clergy of any church or religious denomination is entitled to refuse to divulge that a religious confession was made, or the contents of a religious confession made, to the person when a member of the clergy.
- (2) Subsection (1) does not apply if the communication involved in the religious confession was made for a criminal purpose.
- (3) This section applies even if an Act provides—
 - (a) that the rules of evidence do not apply or that a person or body is not bound by the rules of evidence; or
 - (b) that a person is not excused from answering any question or producing any document or other thing on the ground of privilege or any other ground.
- (4) In this section, *religious confession* means a confession made by a person to a member of the clergy in the member's professional capacity according to the ritual of the church or religious denomination concerned.

128 Privilege in respect of self-incrimination in other proceedings

- (1) This section applies if a witness objects to giving particular evidence, or evidence on a particular matter, on the ground that the evidence may tend to prove that the witness—
 - (a) has committed an offence against or arising under an Australian law or a law of a foreign country; or
 - (b) is liable to a civil penalty.

- (2) The court must determine whether or not there are reasonable grounds for the objection.
- (3) Subject to subsection (4), if the court determines that there are reasonable grounds for the objection, the court is not to require the witness to give the evidence, and is to inform the witness—
 - (a) that the witness need not give the evidence unless required by the court to do so under subsection (4); and
 - (b) that the court will give a certificate under this section if—
 - (i) the witness willingly gives the evidence without being required to do so under subsection (4); or
 - (ii) the witness gives the evidence after being required to do so under subsection (4); and
 - (c) of the effect of such a certificate.
- (4) The court may require the witness to give the evidence if the court is satisfied that—
 - (a) the evidence does not tend to prove that the witness has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country; and
 - (b) the interests of justice require that the witness give the evidence.
- (5) If the witness either willingly gives the evidence without being required to do so under subsection (4), or gives it after being required to do so under that subsection, the court must cause the witness to be given a certificate under this section in respect of the evidence.
- (6) The court is also to cause a witness to be given a certificate under this section if—
 - (a) the objection has been overruled; and
 - (b) after the evidence has been given, the court finds that there were reasonable grounds for the objection.
- (7) In any proceeding in a Victorian court or before any person or body authorised by a law of this State, or by consent of parties, to hear, receive and examine evidence—
 - (a) evidence given by a person in respect of which a certificate under this section has been given; and
 - (b) evidence of any information, document or thing obtained as a direct or indirect consequence of the person having given evidence—

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

Note

This subsection differs from section 128(7) of the Commonwealth Act. The Commonwealth provision refers to an "Australian Court" instead of a "Victorian court".

- (8) Subsection (7) has effect despite any challenge, review, quashing or calling into question on any ground of the decision to give, or the validity of, the certificate concerned.
- (9) If an accused in a criminal proceeding for an offence is given a certificate under this section, subsection (7) does not apply in a proceeding that is a retrial of the accused for the same offence or a trial of the accused for an offence arising out of the same facts that gave rise to that offence.
- (10) In a criminal proceeding, this section does not apply in relation to the giving of evidence by an accused, being evidence that the accused—
 - (a) did an act the doing of which is a fact in issue; or
 - (b) had a state of mind the existence of which is a fact in issue.
- (11) A reference in this section to doing an act includes a reference to failing to act.
- (12) If a person has been given a certificate under a prescribed State or Territory provision in respect of evidence given by a person in a proceeding in a State or Territory court, the certificate has the same effect, in a proceeding to which this subsection applies, as if it had been given under this section.
- (13) For the purposes of subsection (12), a prescribed State or Territory provision is a provision of a law of a State or Territory declared by the regulations to be a prescribed State or Territory provision for the purposes of that subsection.
- (14) Subsection (12) applies to a proceeding in relation to which this Act applies because of section 4, other than a proceeding for an offence against a law of the Commonwealth or for the recovery of a civil penalty under a law of the Commonwealth.

Notes

- 1 Bodies corporate cannot claim this privilege. See section 187.
- 2 Clause 3 of Part 2 of the Dictionary sets out what is a civil penalty.
- 3 Section 128(12) to (14) of the Commonwealth Act gives effect to certificates in relation to self-incriminating evidence under this Act in proceedings in federal and ACT courts and in prosecutions for Commonwealth and ACT offences.
- 4 Subsections (8) and (9) were inserted as a response to the decision of the High Court of Australia in *Cornwell v. The Queen* [2007] HCA 12 (22 March 2007).

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

- (1) In this section—

disclosure order means an order made by a Victorian court in a civil proceeding requiring a person to disclose information, as part of,

or in connection with a freezing or search order under the Rules of the Supreme Court but does not include an order made by a court under the *Proceeds of Crime Act 2002* of the Commonwealth or the **Confiscation Act 1997**;

Note

This definition differs from the New South Wales Act.

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

- (2) If a relevant person objects to complying with a disclosure order on the grounds that some or all of the information required to be disclosed may tend to prove that the person—
 - (a) has committed an offence against or arising under an Australian law or a law of a foreign country; or
 - (b) is liable to a civil penalty—the person must—
 - (c) disclose so much of the information required to be disclosed to which no objection is taken; and
 - (d) prepare an affidavit containing so much of the information required to be disclosed to which objection is taken (the **privilege affidavit**) and deliver it to the court in a sealed envelope; and
 - (e) file and serve on each other party a separate affidavit setting out the basis of the objection.
- (3) The sealed envelope containing the privilege affidavit must not be opened except as directed by the court.
- (4) The court must determine whether or not there are reasonable grounds for the objection.
- (5) Subject to subsection (6), if the court finds that there are reasonable grounds for the objection, the court must not require the information contained in the privilege affidavit to be disclosed and must return it to the relevant person.
- (6) If the court is satisfied that—
 - (a) any information disclosed in the privilege affidavit may tend to prove that the relevant person has committed an offence against or arising under, or is liable to a civil penalty under, an Australian law; and
 - (b) the information does not tend to prove that the relevant person has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country; and
 - (c) the interests of justice require the information to be disclosed—the court may make an order requiring the whole or any part of the privilege affidavit containing information of the kind referred to in paragraph (a) to be filed and served on the parties.

- (7) If the whole or any part of the privilege affidavit is disclosed (including by order under subsection (6)), the court must cause the relevant person to be given a certificate in respect of the information referred to in subsection (6)(a).
- (8) In any proceeding in a Victorian court—
- (a) evidence of information disclosed by a relevant person in respect of which a certificate has been given under this section; and
 - (b) evidence of any information, document or thing obtained as a direct result or indirect consequence of the relevant person having disclosed that information—
- cannot be used against the person. However, this does not apply to a criminal proceeding in respect of the falsity of the evidence concerned.
- (9) Subsection (8) does not prevent the use against the relevant person of any information disclosed by a document—
- (a) that is an annexure or exhibit to a privilege affidavit prepared by the person in response to a disclosure order; and
 - (b) that was in existence before the order was made.
- (10) Subsection (8) has effect despite any challenge, review, quashing or calling into question on any ground of the decision to give, or the validity of, the certificate concerned.
- (11) If a person has been given a certificate under a prescribed State or Territory provision in respect of information of a kind referred to in subsection (6)(a), the certificate has the same effect, in a proceeding to which this subsection applies, as if it had been given under this section.
- (12) For the purposes of subsection (11), a prescribed State or Territory provision is a provision of a law of a State or Territory declared by the regulations to be a prescribed State or Territory provision for the purposes of that subsection.
- (13) Subsection (11) applies to a proceeding in relation to which this Act applies because of section 4, other than a proceeding for an offence against a law of the Commonwealth or for the recovery of a civil penalty under a law of the Commonwealth.

Division 3—Evidence excluded in the public interest

129 Exclusion of evidence of reasons for judicial etc. decisions

- (1) Evidence of the reasons for a decision made by a person who is—
- (a) a judge in an Australian or overseas proceeding; or
 - (b) an arbitrator in respect of a dispute that has been submitted to the person, or to the person and one or more other persons, for arbitration—
- or the deliberations of a person so acting in relation to such a decision, must not be given by the person, or a person who was, in relation to the proceeding or arbitration, under the direction or control of that person.

- (2) Such evidence must not be given by tendering as evidence a document prepared by such a person.
- (3) This section does not prevent the admission or use, in a proceeding, of published reasons for a decision.
- (4) In a proceeding, evidence of the reasons for a decision made by a member of a jury in another Australian or overseas proceeding, or of the deliberations of a member of a jury in relation to such a decision, must not be given by any of the members of that jury.
- (5) This section does not apply in a proceeding that is—
 - (a) a prosecution for one or more of the following offences—
 - (i) *attempt to pervert the course of justice*;
 - (ii) perverting the course of justice;
 - (iii) subornation of perjury;
 - (iv) embracery;
 - (v) bribery of public official;
 - (vi) misconduct in public office;
 - (vii) an offence against section 52A of the **Summary Offences Act 1966** (Offence to harass witness etc.);
 - (viii) an offence against section 66 (Offences by officials) or 78 (Confidentiality of jury's deliberations) of the **Juries Act 2000**;
 - (ix) an offence connected with an offence mentioned in subparagraphs (i) to (viii), including an offence of conspiring to commit such an offence; or
 - (b) in respect of a contempt of a court; or
 - (c) by way of appeal from, or judicial review of, a judgment, decree, order or sentence of a court; or
 - (d) by way of review of an arbitral award; or
 - (e) a civil proceeding in respect of an act of a judicial officer or arbitrator that was, and that was known at the time by the judicial officer or arbitrator to be, outside the scope of the matters in relation to which the judicial officer or arbitrator had authority to act.

Note

Subsection (5)(a) differs from section 129(5)(a) of the Commonwealth Act and New South Wales Act.

130 Exclusion of evidence of matters of state

- (1) If the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the

information or document, the court may direct that the information or document not be adduced as evidence.

- (2) The court may give such a direction either on its own initiative or on the application of any person (whether or not the person is a party).
- (3) In deciding whether to give such a direction, the court may inform itself in any way it thinks fit.
- (4) Without limiting the circumstances in which information or a document may be taken for the purposes of subsection (1) to relate to matters of state, the information or document is taken for the purposes of that subsection to relate to matters of state if adducing it as evidence would—
 - (a) prejudice the security, defence or international relations of Australia; or
 - (b) damage relations between the Commonwealth and a State or between 2 or more States; or
 - (c) prejudice the prevention, investigation or prosecution of an offence; or
 - (d) prejudice the prevention or investigation of, or the conduct of proceedings for recovery of civil penalties brought with respect to, other contraventions of the law; or
 - (e) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information relating to the enforcement or administration of a law of the Commonwealth or a State; or
 - (f) prejudice the proper functioning of the government of the Commonwealth or a State.
- (5) Without limiting the matters that the court may take into account for the purposes of subsection (1), it is to take into account the following matters—
 - (a) the importance of the information or the document in the proceeding;
 - (b) if the proceeding is a criminal proceeding—whether the party seeking to adduce evidence of the information or document is an accused or the prosecutor;
 - (c) the nature of the offence, cause of action or defence to which the information or document relates, and the nature of the subject matter of the proceeding;
 - (d) the likely effect of adducing evidence of the information or document, and the means available to limit its publication;
 - (e) whether the substance of the information or document has already been published;
 - (f) if the proceeding is a criminal proceeding and the party seeking to adduce evidence of the information or document is an accused—

whether the direction is to be made subject to the condition that the prosecution be stayed.

(6) A reference in this section to a State includes a reference to a Territory.

131 Exclusion of evidence of settlement negotiations

(1) Evidence is not to be adduced of—

- (a) a communication that is made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute; or
- (b) a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute.

(2) Subsection (1) does not apply if—

- (a) the persons in dispute consent to the evidence being adduced in the proceeding concerned or, if any of those persons has tendered the communication or document in evidence in another Australian or overseas proceeding, all the other persons so consent; or
- (b) the substance of the evidence has been disclosed with the express or implied consent of all the persons in dispute; or
- (c) the substance of the evidence has been partly disclosed with the express or implied consent of the persons in dispute, and full disclosure of the evidence is reasonably necessary to enable a proper understanding of the other evidence that has already been adduced; or
- (d) the communication or document included a statement to the effect that it was not to be treated as confidential; or
- (e) the evidence tends to contradict or to qualify evidence that has already been admitted about the course of an attempt to settle the dispute; or
- (f) the proceeding in which it is sought to adduce the evidence is a proceeding to enforce an agreement between the persons in dispute to settle the dispute, or a proceeding in which the making of such an agreement is in issue; or
- (g) evidence that has been adduced in the proceeding, or an inference from evidence that has been adduced in the proceeding, is likely to mislead the court unless evidence of the communication or document is adduced to contradict or to qualify that evidence; or
- (h) the communication or document is relevant to determining liability for costs; or
- (i) making the communication, or preparing the document, affects a right of a person; or
- (j) the communication was made, or the document was prepared, in furtherance of the commission of a fraud or an offence or the

commission of an act that renders a person liable to a civil penalty;
or

- (k) one of the persons in dispute, or an employee or agent of such a person, knew or ought reasonably to have known that the communication was made, or the document was prepared, in furtherance of a deliberate abuse of a power.
- (3) For the purposes of subsection (2)(j), if commission of the fraud, offence or act is a fact in issue and there are reasonable grounds for finding that—
- (a) the fraud, offence or act was committed; and
 - (b) a communication was made or document prepared in furtherance of the commission of the fraud, offence or act—

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

- (4) For the purposes of subsection (2)(k), if—
- (a) the abuse of power is a fact in issue; and
 - (b) there are reasonable grounds for finding that a communication was made or document prepared in furtherance of the abuse of power—

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

- (5) In this section—
- (a) a reference to a dispute is a reference to a dispute of a kind in respect of which relief may be given in an Australian or overseas proceeding; and
 - (b) a reference to an attempt to negotiate the settlement of a dispute does not include a reference to an attempt to negotiate the settlement of a criminal proceeding or an anticipated criminal proceeding; and
 - (c) a reference to a communication made by a person in dispute includes a reference to a communication made by an employee or agent of such a person; and
 - (d) a reference to the consent of a person in dispute includes a reference to the consent of an employee or agent of such a person, being an employee or agent who is authorised so to consent; and
 - (e) a reference to commission of an act includes a reference to a failure to act.

- (6) In this section, *power* means a power conferred by or under an Australian law.

Division 4—General

131A Application of Part to preliminary proceedings of courts

- (1) If—
- (a) a person is required by a disclosure requirement to give information, or to produce a document, which would result in the disclosure of a communication, a document or its contents or other information of a kind referred to in Division 1, 1C or 3; and
 - (b) the person objects to giving that information or providing that document—

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

- (2) In this section, *disclosure requirement* means a process or order of a court that requires the disclosure of information or a document and includes the following—
- (a) a summons or subpoena to produce documents or give evidence;
 - (b) pre-trial discovery;
 - (c) non-party discovery;
 - (d) interrogatories;
 - (e) a notice to produce;
 - (f) a request to produce a document under Division 1 of Part 4.6;
 - (g) a search warrant.

Note

Subsection (2) of the New South Wales Act does not include a reference to a search warrant.

132 Court to inform of rights to make applications and objections

If it appears to the court that a witness or a party may have grounds for making an application or objection under a provision of this Part, the court must satisfy itself (if there is a jury, in the absence of the jury) that the witness or party is aware of the effect of that provision.

133 Court may inspect etc. documents

If a question arises under this Part relating to a document, the court may order that the document be produced to it and may inspect the document for the purpose of determining the question.

134 Inadmissibility of evidence that must not be adduced or given

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

PART 3.11—DISCRETIONARY AND MANDATORY EXCLUSIONS

135 General discretion to exclude evidence

The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might—

- (a) be unfairly prejudicial to a party; or
- (b) be misleading or confusing; or
- (c) cause or result in undue waste of time; or
- (d) unnecessarily demean the deceased in a criminal proceeding for a homicide offence.

Note

This section does not limit evidence of family violence that may be adduced under Part IC of the **Crimes Act 1958**.

136 General discretion to limit use of evidence

The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might—

- (a) be unfairly prejudicial to a party; or
- (b) be misleading or confusing.

137 Exclusion of prejudicial evidence in criminal proceedings

In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the accused.

138 Exclusion of improperly or illegally obtained evidence

(1) Evidence that was obtained—

- (a) improperly or in contravention of an Australian law; or
- (b) in consequence of an impropriety or of a contravention of an Australian law—

is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

(2) Without limiting subsection (1), evidence of an admission that was made during or in consequence of questioning, and evidence obtained in consequence of the admission, is taken to have been obtained improperly if the person conducting the questioning—

- (a) did, or omitted to do, an act in the course of the questioning even though he or she knew or ought reasonably to have known that the act or omission was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning; or
- (b) made a false statement in the course of the questioning even though he or she knew or ought reasonably to have known that the statement was false and that making the false statement was likely

to cause the person who was being questioned to make an admission.

- (3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account—
- (a) the probative value of the evidence; and
 - (b) the importance of the evidence in the proceeding; and
 - (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and
 - (d) the gravity of the impropriety or contravention; and
 - (e) whether the impropriety or contravention was deliberate or reckless; and
 - (f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the *International Covenant on Civil and Political Rights*; and
 - (g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and
 - (h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

Note

The *International Covenant on Civil and Political Rights* is set out in Schedule 2 to the *Human Rights and Equal Opportunity Commission Act 1986* of the Commonwealth.

139 Cautioning of persons

- (1) For the purposes of section 138(1)(a), evidence of a statement made or an act done by a person during questioning is taken to have been obtained improperly if—
- (a) the person was under arrest for an offence at the time; and
 - (b) the questioning was conducted by an investigating official who was at the time empowered, because of the office that he or she held, to arrest the person; and
 - (c) before starting the questioning the investigating official did not caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence.
- (2) For the purposes of section 138(1)(a), evidence of a statement made or an act done by a person during questioning is taken to have been obtained improperly if—
- (a) the questioning was conducted by an investigating official who did not have the power to arrest the person; and
 - (b) the statement was made, or the act was done, after the investigating official formed a belief that there was sufficient

evidence to establish that the person has committed an offence;
and

- (c) the investigating official did not, before the statement was made or the act was done, caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence.
- (3) The caution must be given in, or translated into, a language in which the person is able to communicate with reasonable fluency, but need not be given in writing unless the person cannot hear adequately.
- (4) Subsections (1), (2) and (3) do not apply so far as any Australian law requires the person to answer questions put by, or do things required by, the investigating official.
- (5) A reference in subsection (1) to a person who is under arrest includes a reference to a person who is in the company of an investigating official for the purpose of being questioned, if—
 - (a) the official believes that there is sufficient evidence to establish that the person has committed an offence that is to be the subject of the questioning; or
 - (b) the official would not allow the person to leave if the person wished to do so; or
 - (c) the official has given the person reasonable grounds for believing that the person would not be allowed to leave if he or she wished to do so.
- (6) A person is not treated as being under arrest only because of subsection (5) if—
 - (a) the official is performing functions in relation to persons or goods entering or leaving Australia and the official does not believe the person has committed an offence against a law of the Commonwealth; or
 - (b) the official is exercising a power under an Australian law to detain and search the person or to require the person to provide information or to answer questions.

CHAPTER 4—PROOF

...

PART 4.1—STANDARD OF PROOF

140 Civil proceedings—standard of proof

- (1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.
- (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account—
 - (a) the nature of the cause of action or defence; and

- (b) the nature of the subject-matter of the proceeding; and
- (c) the gravity of the matters alleged.

141 Criminal proceedings—standard of proof

- (1) In a criminal proceeding, the court is not to find the case of the prosecution proved unless it is satisfied that it has been proved beyond reasonable doubt.
- (2) In a criminal proceeding, the court is to find the case of an accused proved if it is satisfied that the case has been proved on the balance of probabilities.

142 Admissibility of evidence—standard of proof

- (1) Except as otherwise provided by this Act, in any proceeding the court is to find that the facts necessary for deciding—
 - (a) a question whether evidence should be admitted or not admitted, whether in the exercise of a discretion or not; or
 - (b) any other question arising under this Act—have been proved if it is satisfied that they have been proved on the balance of probabilities.
- (2) In determining whether it is so satisfied, the matters that the court must take into account include—
 - (a) the importance of the evidence in the proceeding; and
 - (b) the gravity of the matters alleged in relation to the question.

...

Part 4.2—Judicial notice

...

144 Matters of common knowledge

- (1) Proof is not required about knowledge that is not reasonably open to question and is—
 - (a) common knowledge in the locality in which the proceeding is being held or generally; or
 - (b) capable of verification by reference to a document the authority of which cannot reasonably be questioned.
- (2) The judge may acquire knowledge of that kind in any way the judge thinks fit.
- (3) The court (including, if there is a jury, the jury) is to take knowledge of that kind into account.
- (4) The judge is to give a party such opportunity to make submissions, and to refer to relevant information, relating to the acquiring or taking into

account of knowledge of that kind as is necessary to ensure that the party is not unfairly prejudiced.

...

PART 4.3—FACILITATION OF PROOF

Division 1—General

146 Evidence produced by processes, machines and other devices

- (1) This section applies to a document or thing—
 - (a) that is produced wholly or partly by a device or process; and
 - (b) that is tendered by a party who asserts that, in producing the document or thing, the device or process has produced a particular outcome.
- (2) If it is reasonably open to find that the device or process is one that, or is of a kind that, if properly used, ordinarily produces that outcome, it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that, in producing the document or thing on the occasion in question, the device or process produced that outcome.

Example

It would not be necessary to call evidence to prove that a photocopier normally produced complete copies of documents and that it was working properly when it was used to photocopy a particular document.

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

- (1) This section applies to a document—
 - (a) that is produced wholly or partly by a device or process; and
 - (b) that is tendered by a party who asserts that, in producing the document, the device or process has produced a particular outcome.
- (2) If—
 - (a) the document is, or was at the time it was produced, part of the records of, or kept for the purposes of, a business (whether or not the business is still in existence); and
 - (b) the device or process is or was at that time used for the purposes of the business—

it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that, in producing the document on the occasion in question, the device or process produced that outcome.

- (3) Subsection (2) does not apply to the contents of a document that was produced—
 - (a) for the purpose of conducting, or for or in contemplation of or in connection with, an Australian or overseas proceeding; or

- (b) in connection with an investigation relating or leading to a criminal proceeding.

Note

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

...

PART 4.5—WARNINGS AND INFORMATION

165 Unreliable evidence

- (1) This section applies to evidence in a civil proceeding that is evidence of a kind that may be unreliable, including the following kinds of evidence—
 - (a) evidence in relation to which Part 3.2 (hearsay evidence) or 3.4 (admissions) applies;
 - (b) identification evidence;
 - (c) evidence the reliability of which may be affected by age, ill health (whether physical or mental), injury or the like;
 - ...
 - (g) in a proceeding against the estate of a deceased person—evidence adduced by or on behalf of a person seeking relief in the proceeding that is evidence about a matter about which the deceased person could have given evidence if he or she were alive.

Note

Subsection (1) differs from section 165(1) of the Commonwealth Act and New South Wales Act.

- (2) If there is a jury and a party so requests, the judge is to—
 - (a) warn the jury that the evidence may be unreliable; and
 - (b) inform the jury of matters that may cause it to be unreliable; and
 - (c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.
- (3) The judge need not comply with subsection (2) if there are good reasons for not doing so.
- (4) It is not necessary that a particular form of words be used in giving the warning or information.
- (5) This section does not affect any other power of the judge to give a warning to, or to inform, the jury.
- (6) Subsection (2) does not permit a judge to warn or inform a jury in proceedings before it in which a child gives evidence that the reliability of the child's evidence may be affected by the age of the child. Any

such warning or information may be given only in accordance with section 165A(2) and (3).

Note

This section applies only to civil proceedings. Divisions 3 and 4 of Part 4 of the **Jury Directions Act 2015** contain provisions relating to unreliable evidence and identification evidence that apply in criminal trials.

165A Warnings in relation to children's evidence

- (1) A judge in any civil proceeding in which evidence is given by a child before a jury must not do any of the following—
 - (a) warn the jury, or suggest to the jury, that children as a class are unreliable witnesses;
 - (b) warn the jury, or suggest to the jury, that the evidence of children as a class is inherently less credible or reliable, or requires more careful scrutiny, than the evidence of adults;
 - (c) give a warning, or suggestion to the jury, about the unreliability of the particular child's evidence solely on account of the age of the child.

* * * * *

Note

Subsection (1) differs from section 165A(1) of the Commonwealth Act and New South Wales Act.

- (2) Subsection (1) does not prevent the judge, at the request of a party, from—
 - (a) informing the jury that the evidence of the particular child may be unreliable and the reasons why it may be unreliable; and
 - (b) warning or informing the jury of the need for caution in determining whether to accept the evidence of the particular child and the weight to be given to it—

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

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

Note

This section applies only to civil proceedings. Division 3 of Part 4 of the **Jury Directions Act 2015** contains provisions relating to children's evidence that apply in criminal trials.

165B Delay in prosecution

...

Note

The Commonwealth Act and New South Wales Act include a section requiring the judge to give certain directions to the jury relating to delay and forensic disadvantage. Division 5 of Part 4 of the **Jury Directions Act 2015** contains provisions relating to delay and forensic disadvantage that apply in criminal trials.

...

CHAPTER 5—MISCELLANEOUS

189 The voir dire

- (1) If the determination of a question whether—
 - (a) evidence should be admitted (whether in the exercise of a discretion or not); or
 - (b) evidence can be used against a person; or
 - (c) a witness is competent or compellable—depends on the court finding that a particular fact exists, the question whether that fact exists is, for the purposes of this section, a preliminary question.
- (2) If there is a jury, a preliminary question whether—
 - (a) particular evidence is evidence of an admission, or evidence to which section 138 (Discretion to exclude improperly or illegally obtained evidence) applies; or
 - (b) evidence of an admission, or evidence to which section 138 applies, should be admitted—is to be heard and determined in the jury's absence.
- (3) In the hearing of a preliminary question about whether an admission made by an accused should be admitted into evidence (whether in the exercise of a discretion or not) in a criminal proceeding, the issue of the admission's truth or untruth is to be disregarded unless the issue is introduced by the accused.
- (4) If there is a jury, the jury is not to be present at a hearing to decide any other preliminary question unless the court so orders.
- (5) Without limiting the matters that the court may take into account in deciding whether to make such an order, it is to take into account—
 - (a) whether the evidence to be adduced in the course of that hearing is likely to be prejudicial to the accused; and
 - (b) whether the evidence concerned will be adduced in the course of the hearing to decide the preliminary question; and
 - (c) whether the evidence to be adduced in the course of that hearing would be admitted if adduced at another stage of the hearing

(other than in another hearing to decide a preliminary question or, in a criminal proceeding, a hearing in relation to sentencing).

- (6) Section 128(10) does not apply to a hearing to decide a preliminary question.
- (7) In the application of Chapter 3 to a hearing to determine a preliminary question, the facts in issue are taken to include the fact to which the hearing relates.
- (8) If a jury in a proceeding was not present at a hearing to determine a preliminary question, evidence is not to be adduced in the proceeding of evidence given by a witness at the hearing unless—
 - (a) it is inconsistent with other evidence given by the witness in the proceeding; or
 - (b) the witness has died.

190 Waiver of rules of evidence

- (1) The court may, if the parties consent, by order dispense with the application of any one or more of the provisions of—
 - (a) Division 3, 4 or 5 of Part 2.1; or
 - (b) Part 2.2 or 2.3; or
 - (c) Parts 3.2–3.8—in relation to particular evidence or generally.
- (2) In a criminal proceeding, a consent given by an accused is not effective for the purposes of subsection (1) unless—
 - (a) the accused has been advised to do so by the Australian legal practitioner of the accused; or

Note

Paragraph (a) differs from the Commonwealth Act and New South Wales Act.

- (b) the court is satisfied that the accused understands the consequences of giving the consent.
- (3) In a civil proceeding, the court may order that any one or more of the provisions mentioned in subsection (1) do not apply in relation to evidence if—
 - (a) the matter to which the evidence relates is not genuinely in dispute; or
 - (b) the application of those provisions would cause or involve unnecessary expense or delay.
- (4) Without limiting the matters that the court may take into account in deciding whether to exercise the power conferred by subsection (3), it is to take into account—
 - (a) the importance of the evidence in the proceeding; and

- (b) the nature of the cause of action or defence and the nature of the subject-matter of the proceeding; and
- (c) the probative value of the evidence; and
- (d) the powers of the court (if any) to adjourn the hearing, to make another order or to give a direction in relation to the evidence.

...

192 Leave, permission or direction may be given on terms

- (1) If, because of this Act, a court may give any leave, permission or direction, the leave, permission or direction may be given on such terms as the court thinks fit.
- (2) Without limiting the matters that the court may take into account in deciding whether to give the leave, permission or direction, it is to take into account—
 - (a) the extent to which to do so would be likely to add unduly to, or to shorten, the length of the hearing; and
 - (b) the extent to which to do so would be unfair to a party or to a witness; and
 - (c) the importance of the evidence in relation to which the leave, permission or direction is sought; and
 - (d) the nature of the proceeding; and
 - (e) the power (if any) of the court to adjourn the hearing or to make another order or to give a direction in relation to the evidence.

192A Advance rulings and findings

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

- (a) the admissibility or use of evidence proposed to be adduced; or
- (b) the operation of a provision of this Act or another law in relation to evidence proposed to be adduced; or
- (c) the giving of leave, permission or direction under section 192—

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

DICTIONARY

Section 3

PART 1—DEFINITIONS

ACT court

Note

The Commonwealth Act includes a definition of this term.

admission means a previous representation that is—

- (a) made by a person who is or becomes a party to a proceeding (including an accused in a criminal proceeding); and
- (b) adverse to the person's interest in the outcome of the proceeding;

asserted fact is defined in section 59;

associated accused, in relation to an accused in a criminal proceeding, means a person against whom a prosecution has been instituted, but not yet completed or terminated, for—

- (a) an offence that arose in relation to the same events as those in relation to which the offence for which the accused is being prosecuted arose; or
- (b) an offence that relates to or is connected with the offence for which the accused is being prosecuted;

Australia includes the external Territories;

Australian court means—

- (a) the High Court; or
- (b) a court exercising federal jurisdiction; or
- (c) a court of a State or Territory; or
- (d) a judge, justice or arbitrator under an Australian law; or
- (e) a person or body authorised by an Australian law, or by consent of parties, to hear, receive and examine evidence; or
- (f) a person or body that, in exercising a function under an Australian law, is required to apply the laws of evidence;

Australian law means a law of the Commonwealth, a State or a Territory;

Note

See clause 9 of Part 2 of this Dictionary for the meaning of **law**.

* * * * *

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

Australian Parliament means the Parliament, the Parliament of the Commonwealth or another State or the Legislative Assembly of a Territory;

* * * * *

Australian-registered foreign lawyer has the meaning it has in the Legal Profession Uniform Law (Victoria);

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

business is defined in clause 1 of Part 2 of this Dictionary;

case of a party means the facts in issue in respect of which the party bears the legal burden of proof;

child means a child of any age and includes the meaning given in clause 10(1) of Part 2 of this Dictionary;

civil penalty is defined in clause 3 of Part 2 of this Dictionary;

civil proceeding means a proceeding other than a criminal proceeding;

client is defined in section 117;

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

coincidence rule means section 98(1);

Commonwealth owned body corporate means a body corporate that, were the Commonwealth a body corporate, would, for the purposes of the *Corporations Act 2001* of the Commonwealth, be—

- (a) a wholly-owned subsidiary of the Commonwealth; or
- (b) a wholly-owned subsidiary of another body corporate that is, under this definition, a Commonwealth owned body corporate because of the application of paragraph (a) (including the application of that paragraph together with another application or other applications of this paragraph);

Commonwealth record means a record made by—

- (a) a Department within the meaning of the *Public Service Act 1999* of the Commonwealth; or
- (b) the Parliament, a House of the Parliament, a committee of a House of the Parliament or a committee of the Parliament; or
- (c) a person or body, other than a Legislative Assembly, holding office, or exercising power, under or because of the Commonwealth Constitution or a law of the Commonwealth; or
- (d) a body or organisation other than a Legislative Assembly, whether incorporated or unincorporated, established for a public purpose—
 - (i) by or under a law of the Commonwealth or of a Territory (other than the Australian Capital Territory, the Northern Territory or Norfolk Island); or

- (ii) by the Governor-General; or
- (iii) by a Minister of the Commonwealth; or
- (e) any other body or organisation that is a Commonwealth owned body corporate—

and kept or maintained by a person, body or organisation of a kind referred to in paragraph (a), (b), (c), (d) or (e), but does not include a record made by a person or body holding office, or exercising power, under or because of the Commonwealth Constitution or a law of the Commonwealth if the record was not made in connection with holding the office concerned, or exercising the power concerned;

confidential communication is defined in section 117;

confidential document is defined in section 117;

court means Victorian court;

Notes

- 1 Victorian court is defined in this Dictionary.
- 2 The Commonwealth Act does not include this definition.

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

credibility of a witness means the credibility of any part or all of the evidence of the witness, and includes the witness's ability to observe or remember facts and events about which the witness has given, is giving or is to give evidence;

credibility evidence is defined in section 101A;

credibility rule means section 102;

criminal proceeding means a prosecution for an offence and includes—

- (a) a proceeding for the committal of a person for trial or sentence for an offence; and
- (b) a proceeding relating to bail—

but does not include a prosecution for an offence that is a prescribed taxation offence within the meaning of Part III of the *Taxation Administration Act 1953* of the Commonwealth;

cross-examination is defined in clause 2(2) of Part 2 of this Dictionary;

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

de facto partner is defined in clause 11 of Part 2 of this Dictionary;

document means any record of information, and includes—

- (a) anything on which there is writing; or

- (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; or
- (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; or
- (d) a map, plan, drawing or photograph;

Note

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

electronic communication has the same meaning as it has in the **Electronic Transactions (Victoria) Act 2000**;

examination in chief is defined in clause 2(1) of Part 2 of this Dictionary;

exercise of a function includes performance of a duty;

fax, in relation to a document, means a copy of the document that has been reproduced by facsimile telegraphy;

federal court

Note

The Commonwealth Act includes a definition of this term.

foreign court means any court (including any person or body authorised to take or receive evidence, whether on behalf of a court or otherwise and whether or not the person or body is empowered to require the answering of questions or the production of documents) of a foreign country or a part of such a country;

foreign lawyer has the same meaning as it has in the Legal Profession Uniform Law (Victoria);

function includes power, authority or duty;

government or official gazette includes the Government Gazette;

Note

The definition of this term in the Commonwealth Act and New South Wales Act differs from this definition.

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

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

Note

The Commonwealth Act does not include definitions of ***Governor of a State*** and ***Governor-General***. These definitions are covered by sections 16A and 16B of the *Acts Interpretation Act 1901* of the Commonwealth.

hearsay rule means section 59(1);

identification evidence means evidence that is—

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

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

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

at or about the time at which the offence was committed or the act was done, being an assertion that is based wholly or partly on what the person making the assertion saw, heard or otherwise perceived at that place and time; or

(b) a report (whether oral or in writing) of such an assertion;

investigating official means—

(a) a police officer (other than a police officer who is engaged in covert investigations under the orders of a superior); or

(b) a person appointed by or under an Australian law (other than a person who is engaged in covert investigations under the orders of a superior) whose functions include functions in respect of the prevention or investigation of offences;

joint sitting means—

(a) in relation to the Parliament of the Commonwealth—a joint sitting of the members of the Senate and of the House of Representatives convened by the Governor-General under section 57 of the Commonwealth Constitution or convened under any Act of the Commonwealth; or

(b) in relation to a bicameral legislature of a State—a joint sitting of both Houses of the legislature convened under a law of the State;

judge, in relation to a proceeding, means the judge, magistrate or other person before whom the proceeding is being held;

law is defined in clause 9 of Part 2 of this Dictionary;

leading question means a question asked of a witness that—

(a) directly or indirectly suggests a particular answer to the question; or

(b) assumes the existence of a fact the existence of which is in dispute in the proceeding and as to the existence of which the witness has not given evidence before the question is asked;

* * * * *

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

member of the Australian Federal Police includes a special member or a staff member of the Australian Federal Police;

non-participant registered foreign lawyer has the same meaning as it has in Schedule 3 to the Legal Profession Uniform Law (Victoria);

NSW court

Note

The New South Wales Act includes this definition.

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

opinion rule means section 76;

* * * * *

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

picture identification evidence is defined in section 115;

police officer means—

- (a) a member of the Australian Federal Police; or
- (b) a member of the police force of a State or Territory;

postal article has the same meaning as in the *Australian Postal Corporation Act 1989* of the Commonwealth;

previous representation means a representation made otherwise than in the course of giving evidence in the proceeding in which evidence of the representation is sought to be adduced;

prior consistent statement of a witness means a previous representation that is consistent with evidence given by the witness;

prior inconsistent statement of a witness means a previous representation that is inconsistent with evidence given by the witness;

probative value of evidence means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue;

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

public document means a document that—

- (a) forms part of the records of the Crown in any of its capacities; or
- (b) forms part of the records of the government of a foreign country; or
- (c) forms part of the records of a person or body holding office or exercising a function under or because of the Commonwealth Constitution, an Australian law or a law of a foreign country; or
- (d) is being kept by or on behalf of the Crown, such a government or such a person or body—

and includes the records of the proceedings of, and papers presented to—

- (e) an Australian Parliament, a House of an Australian Parliament, a committee of such a House or a committee of an Australian Parliament; and
- (f) a legislature of a foreign country, including a House or committee (however described) of such a legislature;

re-examination is defined in clause 2(3) and (4) of Part 2 of this Dictionary;

representation includes—

- (a) an express or implied representation (whether oral or in writing); or
- (b) a representation to be inferred from conduct; or
- (c) a representation not intended by its maker to be communicated to or seen by another person; or
- (d) a representation that for any reason is not communicated;

seal includes a stamp;

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

tendency rule means section 97(1);

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

Victorian court means—

- (a) the Supreme Court; or
- (b) any other court created by Parliament—

and includes any person or body (other than a court) that, in exercising a function under the law of the State, is required to apply the laws of evidence;

Note

The Commonwealth Act and New South Wales Act do not include this definition.

visual identification evidence is defined in section 114;

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

PART 2—OTHER EXPRESSIONS

1 References to businesses

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

- (a) a profession, calling, occupation, trade or undertaking;
 - (b) an activity engaged in or carried on by the Crown in any of its capacities;
 - (c) an activity engaged in or carried on by the government of a foreign country;
 - (d) an activity engaged in or carried on by a person or body holding office or exercising power under or because of the Commonwealth Constitution, an Australian law or a law of a foreign country, being an activity engaged in or carried on in the performance of the functions of the office or in the exercise of the power (otherwise than in a private capacity);
 - (e) the proceedings of an Australian Parliament, a House of an Australian Parliament, a committee of such a House or a committee of an Australian Parliament;
 - (f) the proceedings of a legislature of a foreign country, including a House or committee (however described) of such a legislature.
- (2) A reference in this Act to a business also includes a reference to—
- (a) a business that is not engaged in or carried on for profit; or
 - (b) a business engaged in or carried on outside Australia.

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

- (1) A reference in this Act to *examination in chief* of a witness is a reference to the questioning of a witness by the party who called the witness to give evidence, not being questioning that is re-examination.
- (2) A reference in this Act to *cross-examination* of a witness is a reference to the questioning of a witness by a party other than the party who called the witness to give evidence.
- (3) A reference in this Act to *re-examination* of a witness is a reference to the questioning of a witness by the party who called the witness to give evidence, being questioning (other than further examination in chief with the leave of the court) conducted after the cross-examination of the witness by another party.
- (4) If a party has recalled a witness who has already given evidence, a reference in this Act to re-examination of a witness does not include a reference to the questioning of the witness by that party before the witness is questioned by another party.

3 References to civil penalties

For the purposes of this Act, a person is taken to be liable to a civil penalty if, in an Australian or overseas proceeding (other than a criminal proceeding), the person would be liable to a penalty arising under an Australian law or a law of a foreign country.

4 Unavailability of persons

- (1) For the purposes of this Act, a person is taken not to be available to give evidence about a fact if—
 - (a) the person is dead; or
 - (b) the person is, for any reason other than the application of section 16 (Competence and compellability—judges and jurors), not competent to give the evidence; or
 - (c) the person is mentally or physically unable to give the evidence and it is not reasonably practicable to overcome that inability; or
 - (d) it would be unlawful for the person to give the evidence; or
 - (e) a provision of this Act prohibits the evidence being given; or
 - (f) all reasonable steps have been taken, by the party seeking to prove the person is not available, to find the person or secure his or her attendance, but without success; or
 - (g) all reasonable steps have been taken, by the party seeking to prove the person is not available, to compel the person to give the evidence, but without success.
- (2) In all other cases the person is taken to be available to give evidence about the fact.

5 Unavailability of documents and things

For the purposes of this Act, a document or thing is taken not to be available to a party if and only if—

- (a) it cannot be found after reasonable inquiry and search by the party; or
- (b) it was destroyed by the party, or by a person on behalf of the party, otherwise than in bad faith, or was destroyed by another person; or
- (c) it would be impractical to produce the document or thing during the course of the proceeding; or
- (d) production of the document or thing during the course of the proceeding could render a person liable to conviction for an offence; or
- (e) it is not in the possession or under the control of the party and—
 - (i) it cannot be obtained by any judicial procedure of the court; or
 - (ii) it is in the possession or under the control of another party to the proceeding concerned who knows or might reasonably be expected to know that evidence of the contents of the document, or evidence of the thing, is likely to be relevant in the proceeding; or
 - (iii) it was in the possession or under the control of such a party at a time when that party knew or might reasonably be

expected to have known that such evidence was likely to be relevant in the proceeding.

6 Representations in documents

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

- (a) the document was written, made or otherwise produced by the person; or
- (b) the representation was recognised by the person as his or her representation by signing, initialling or otherwise marking the document.

7 Witnesses

- (1) A reference in this Act to a witness includes a reference to a party giving evidence.
- (2) A reference in this Act to a witness who has been called by a party to give evidence includes a reference to the party giving evidence.
- (3) A reference in this clause to a party includes an accused in a criminal proceeding.

8 References to documents

A reference in this Act to a document includes a reference to—

- (a) any part of the document; or
- (b) any copy, reproduction or duplicate of the document or of any part of the document; or
- (c) any part of such a copy, reproduction or duplicate.

8A References to offices etc.

In this Act—

- (a) a reference to a person appointed or holding office under or because of an Australian law or a law of the Commonwealth includes a reference to an APS employee within the meaning of the *Public Service Act 1999* of the Commonwealth; and
- (b) in that context, a reference to an office is a reference to a position occupied by the APS employee concerned, and a reference to an officer includes a reference to a Secretary, or APS employee, within the meaning of the Act.

9 References to laws

- (1) A reference in this Act to a law of the Commonwealth, a State, a Territory or a foreign country is a reference to a law (whether written or unwritten) of or in force in that place.
- (2) A reference in this Act to an Australian law is a reference to an Australian law (whether written or unwritten) of or in force in Australia.

10 References to children and parents

- (1) A reference in this Act to a child of a person includes a reference to—
 - (a) an adopted child or ex-nuptial child of the person; or
 - (b) a child living with the person as if the child were a member of the person's family.
- (2) A reference in this Act to a parent of a person includes a reference to—
 - (a) an adoptive parent of the person; or
 - (b) if the person is an ex-nuptial child—the person's natural father; or
 - (c) the person with whom a child is living as if the child were a member of the person's family.

11 References to de facto partners

- (1) A reference in this Act to a de facto partner of a person is a reference to a person who is in a de facto relationship with the person.
- (2) A person is in a de facto relationship with another person if the two persons have a relationship as a couple and are not legally married.
- (3) In determining whether two persons are in a de facto relationship, all the circumstances of the relationship are to be taken into account, including such of the following matters as are relevant in the circumstances of the particular case—
 - (a) the duration of the relationship;
 - (b) the nature and extent of their common residence;
 - (c) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
 - (d) the ownership, use and acquisition of their property;
 - (e) the degree of mutual commitment to a shared life;
 - (f) the care and support of children;
 - (g) the reputation and public aspects of the relationship.
- (4) No particular finding in relation to any circumstance is to be regarded as necessary in deciding whether two persons have a relationship as a couple.
- (5) For the purposes of subclause (3), the following matters are irrelevant—
 - (a) whether the persons are different sexes or the same sex;
 - (b) whether either of the persons is legally married to someone else or in another de facto relationship.
- (6) Despite subclauses (3) and (4), a person is in a de facto relationship with another person if those two persons are in a registered domestic relationship within the meaning of the **Relationships Act 2008**.

Note

The Commonwealth Act and New South Wales Act do not include subclause (6).
