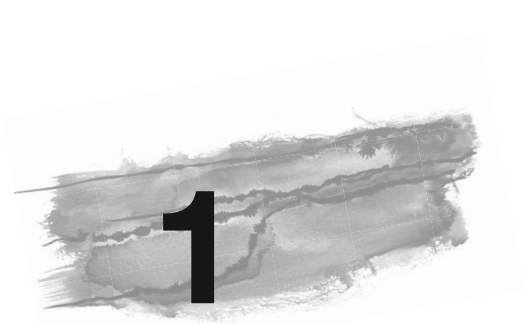

1 UNIFORM EVIDENCE LAW

INTRODUCTION

The so-called 'uniform evidence law' (or 'uniform evidence Acts') presently comprises seven Australian statutes:

- *Evidence Act 1995* (Cth)
- *Evidence Act 1995* (NSW)
- *Evidence Act 2001* (Tas)
- *Evidence Act 2004* (Norfolk Island)[1]
- *Evidence Act 2008* (Vic)
- *Evidence Act 2011* (ACT)
- *Evidence (National Uniform Legislation) Act 2011* (NT).

Despite the latter statute's (non-uniform) name, the uniform evidence law is not a national law; however, it is easier to list the Australian jurisdictions where such statutes have not been enacted.

There are just three: Queensland, South Australia and Western Australia. Although, as Heydon J archly observed in *Baker v The Queen*,[2] '[t]hose polities are very large in area'—indeed, they total nearly 70 per cent of the continent—Australia's uniform evidence law scheme has clear 'majority' status in two respects:

- by jurisdiction, reaching seven out of the nation's ten court systems
- by population, now reaching over five out of every eight Australians (ignoring the Commonwealth Act, which applies to federal courts everywhere).

On the other hand, there have been no new Australian entries to the scheme since the Northern Territory's adoption in 2011.

The non-adopting jurisdictions face a form of limbo, following Australia's mostly abandoned 'common law of evidence', tinkered with by local statutes. But the seven adopting jurisdictions likewise face the prospect of following a revolutionary scheme that has partially stalled. This third edition will continue to cover only the adopting jurisdictions, although it is clear that this task still involves attention to the earlier law (see [**1.3.2**] under the heading '**Common law**') and to an increasing set of legislative and judicial divergences in the uniform scheme (see [**1.2**], '**Uniform law**'.)

1 Preserved in Norfolk Island despite the abolition of the Norfolk Island Legislative Assembly: *Norfolk Island Act 1979* (Cth), s 16A(1).

2 [2012] HCA 27; (2012) 245 CLR 632.

This chapter introduces the uniform evidence law's basic features. First, it describes the most conservative feature of the scheme: its continuity with earlier traditions of evidence law. Second, it describes and assesses the scheme's goal of a broadly applicable, uniformly developed and easily found Australian evidence law. Finally, it details the connections between the uniform evidence law and other laws: local statutes, the common law, overseas law and human rights law.

1.1 EVIDENCE LAW

By far the most important feature of the uniform evidence law is that it is *not* a radical change from the previous law. Of course, there are any number of individual provisions that could be described as radical: the new hearsay rule, the new hearsay exceptions, the tendency and coincidence rules, and many others. But to focus on such changes is to miss the (entirely traditional) wood for the (occasionally pruned, chopped down, replaced or even newly planted) trees.

Australian evidence law is, and always has been, a bundle of procedural rules that make relatively limited inroads into the freedom of parties and courts to present and find facts as they wish. The uniform evidence law's basic structure of:

- rules providing for various courtroom events (in this book, Part 1: Adducing Evidence)
- various exceptions and sub-exceptions to the rule that a court can make use of any information that is relevant (in this book, Part 2: Admissibility of Evidence)
- some mild controls on the outcomes of that use (in this book, Part 3: Proof).

is identical to the approach (but not the much more amorphous form) of the common law.

This preliminary chapter introduces the unchanged purposes of Australian evidence law. It first addresses the law's primary purpose: to promote the accuracy of legal fact-finding. It then considers alternative goals that some rules of evidence promote, even to the extent of undermining that primary purpose.

1.1.1 Promoting accurate fact-finding

The law of evidence regulates the means by which facts can be proved in litigation. In the vast majority of civil and criminal proceedings, the main point of disagreement between prosecution or plaintiff on the one hand and defendant on the other will not be about the legal consequences of an agreed set of facts; it will be about what the facts actually are. This is the province of the law of evidence.

Evidence law is usually described as an aspect of 'procedural' or 'adjectival' law in order to distinguish it from the 'substantive' law, such as the law of contract or the criminal law. As High Court Justice Stephen Gageler recently explained, the reality is more complex:

> Historically, rules of procedure and rules of substantive law were very much more blurred than they are now. Many rules that a century before would have been considered

> rules of evidence had been transmogrified by the time of Dixon's retirement into rules of substantive law. The so-called 'parol evidence rule' in the law of contract and the pervasive doctrine of estoppel are examples.[3]

The contemporary law of evidence consists of those rules that have separated sufficiently from the substantive law that their goals are regarded as being distinct from the rest of the law.

The main goal of evidence law is to regulate how courts ascertain the facts to which the substantive law is applied. Or, as Gageler J points out, to adjudicate the facts:

> The essential feature of fact finding within an adversary system of justice is that the tribunal of fact—whether it be a jury or a judge—is tasked not with the independent pursuit of truth but with arbitration of a contest between parties who assert different versions of the truth.[4]

Just as courts and lawyers typically give only occasional thought to the deep debates about the nature of 'law', evidence law practitioners and scholars generally eschew questions about what the 'truth' is. In doing so, they uncritically adopt a tradition of promoting a set of *principles* about legal proof. These principles are—for the most part—not expressly listed and, indeed, can be formulated in myriad ways. However, few practitioners or scholars of Australian evidence law would disagree with the thrust of the four principles discussed at [**1.1.1.1**]–[**1.1.1.4**].

That is not to say, of course, that there would not be considerable disagreement about how these principles translate into rules of evidence. None of the principles is used to determine questions about the use of evidence; that task is instead performed by the actual rules of evidence. Indeed, despite the common aim of the basic principles, they typically pull in different directions, allowing for considerable disagreement among those who subscribe to them about what the rules are and how they should be applied.

1.1.1.1 Fact-finding should be rational

The most fundamental principle of evidence law is that legal fact-finders should reason rationally. This principle is most visible when courts reject reasoning that is irrational. A commonly cited example is *R v Young*,[5] where a new trial was ordered after an appeal court learnt that some jurors in a murder trial had used a ouija board to consult with one of the deceased victims about facts associated with the crime, including the identity of the murderer and the appropriate verdict. Noting that some jurors took the séance seriously enough that they were reduced to tears, the court deemed the events a 'material irregularity'. However, a newspaper editorial at the time queried whether a juror's prayer for guidance would be similarly irregular and the court itself was at pains to distinguish its ruling from jurors' 'strongly expressed' attempts to influence each other's thinking. An English court has dismissed a juror who wanted to use astrology

3 S Gageler, 'Evidence and Truth' (2017) 13 *The Judicial Review* 249.

4 S Gageler, 'Evidence and Truth' (2017) 13 *The Judicial Review* 249.

5 [1995] QB 324.

to assist in his deliberations, while an American court has upheld a verdict that a juror may have reached using prayer.[6]

The requirement that fact-finding be rational is not confined to a rejection of unscientific beliefs. For example, evidence law's conception of proper reasoning rejects some classically 'scientific' approaches, such as a judge reading the (non-legal) academic literature that is relevant to a dispute or a juror relying on his or her professional expertise to assist the jury's deliberations.[7] The principle that reasoning should be rational is really a shorthand for evidence lawyers' shared and intuitive allegiance to a traditional way of thinking in legal settings.

William Twining sets out some of the common assumptions of evidence law's 'rationalist tradition' as follows:[8]

- 'Knowledge about particular past events is possible.'
- 'Operative distinctions have to be maintained between questions of fact and questions of law, questions of fact and questions of value and questions of fact and questions of opinion.'
- 'The establishment of the truth of alleged facts in adjudication is typically a matter of probabilities, falling short of absolute certainty.'
- 'Judgments about the probabilities of allegations about particular past events can and should be reached by reasoning from relevant evidence presented to the decision-maker.'
- 'The characteristic mode of reasoning appropriate to reasoning about probabilities is induction.'
- 'Judgments about probabilities have, generally speaking, to be based on the available stock of knowledge about the common course of events; this is largely a matter of common sense supplemented by specialized scientific or expert knowledge when it is available.'

Twining argues that, despite the existence of strenuous criticisms of all of these assumptions and the critical nature of most evidence law scholarship, acceptance of the entire rationalist tradition is virtually unanimous among evidence lawyers and the courts.

Indeed, under the uniform evidence legislation, the rationalist tradition is mandatory. The 'Dictionary' section of the legislation defines the fundamental concept of the 'probative value of evidence' to mean 'the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue' and section 55(1) defines 'relevant' evidence as 'evidence that, if it were accepted, could

6 P Wilkinson, 'Juror Who Wanted to Find Truth in Stars', *The Times*, 9 July 1998; *State v DeMille* 7526 P 2d 81 (1988).

7 *Aytugrul v The Queen* [2012] HCA 15; (2012) 247 CLR 170, [20]; *R v Fricker* [1999] EWCA Crim J0624-2.

8 W Twining, *Rethinking Evidence*, 1990, London: Basil Blackwell, 73.

rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding'.[9]

The real impact of the rationalist tradition is in the regulation of how evidence that is admitted in proceedings can be *used*. The assumption in all discussions of evidence law is that the only legitimate uses that can ever be made of evidence are those that involve rational reasoning. Most of the major rules of evidence involve placing additional restrictions on the use of evidence. Any discussion of such rules implicitly assumes that irrational uses will, in any case, never be legitimately available to the fact-finder.

Although central to the law of evidence, questions about rational fact-finding such as what it is and how to do it are rarely addressed by courts, statutes or textbooks. There are many reasons for this, including the views that rationality is a matter of common sense and that it is not a legal topic.[10] While the authors agree with Twining that rational fact-finding can and should be addressed in legal texts and courses, this text follows the usual approach of assuming that readers already know how to reason rationally and about probabilities. Doing so is made more palatable by the publication of a book on proof and fact-finding written by one of the authors.[11]

1.1.1.2 Relevant information should be available to the court

The next principle is that the fact-finder should have access to all information that is capable of supporting rational reasoning about the facts at issue in the proceedings. If the court fails to take into account such relevant information, then this will obviously increase the chances of it reaching an incorrect verdict. The aim of ensuring that all relevant information is considered by the court gives rise to the only principle of admission in the law of evidence: relevant evidence ought to be used.

This principle is given expression in section 56(1) as follows:

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

The words 'Except as otherwise provided by this Act' indicate that relevant evidence may nevertheless be excluded because it falls foul of one or more of the exclusionary rules. In practice the principle that all relevant information should be admitted really only ensures the use of information that has more than merely marginal relevance. Where information has only a slight relevance to the inquiry its exclusion is unlikely to increase the risk of the court making a wrong decision, and can be justified on the

9 See A Roberts, 'Probative Value, Reliability and Rationality' in A Roberts & J Gans (eds), *Critical Perspectives on the Uniform Evidence Law*, 2017, Sydney: Federation Press.

10 See W Twining, 'Taking Facts Seriously', ibid, 12.

11 A Palmer, *Proof: How to Analyse Evidence in Preparation for Trial,* 3rd edn, 2014, Sydney: Thomson Reuters.

grounds that admitting absolutely all relevant information would make litigation too lengthy and expensive.

As Justice Gageler recounts, the principle is not a guarantee that court decisions will actually be based on every piece of relevant information. He quotes a story about one of Australia's most famous judges, Sir Owen Dixon:

> At a dinner party, a woman seated next to him was enthusing about how splendid it must be to dispense justice. Dixon replied, in a tone that could only be his:
>
> 'I do not have anything to do with justice, madam. I sit on a court of appeal, where none of the facts are known. One third of the facts are excluded by normal frailty and memory; one third by the negligence of the profession; and the remaining third by the archaic laws of evidence.'[12]

The law of evidence cannot address the loss of evidence through external exigencies and can only indirectly affect the behaviour of the opposing parties, who may each decide that they prefer the court not to know about a relevant matter. Substantive law now bars some destruction of evidence, but preserves the parties' role (and the court's adjudication of what evidence is useable) by penalising jurors who conduct their own research into a case.[13] Indeed, the use of ouija boards by jurors—which the High Court characterises as 'irresponsible'[14]—may now be criminal.

1.1.1.3 Irrational fact-finding should be discouraged

The third principle is to discourage irrational fact-finding. Discouraging irrationality is, of course, a further corollary of evidence law's acceptance of the rationalist tradition. However, the law is not content to achieve this role passively through the encouragement of rationality. Rather, a core concern of evidence law is the taking of active measures against irrationality, especially when fact-finding is in the hands of lay jurors.

One aspect of the discouragement of irrationality is the most fundamental 'exclusionary' rule in evidence law. Just as the promotion of accurate fact-finding requires the use of relevant information, so it requires that the court does *not* take into consideration irrelevant information. Section 56(2) provides:

> Evidence that is not relevant in the proceeding is not admissible.

The existence of this rule supposes that there is some harm in allowing irrelevant information to be considered by the court. One might ask: if the information cannot be rationally used, then will it not simply be ignored by the court? Possible answers are that the evidence might be used irrationally, especially if its presentation is understood as condoning its use by the fact-finder, or that the use of irrelevant evidence is a waste of time and resources, ultimately compromising accurate fact-finding. In the end,

12 S Gageler, 'Evidence and Truth' (2017) 13 *The Judicial Review* 249, citing P Ayres, '"Owen Dixon's Causation Lecture: Radical Scepticism"' (2003) 77 ALJ 682, at 693.

13 *Crimes Act 1958* (Vic), s 254; *Federal Court of Australia Act 1976* (Cth), s 58AM; *Jury Act 1977* (NSW), s 68C; *Juries Act 2000* (Vic), s 78A.

14 *Smith v Western Australia* [2014] HCA 3; (2014) 88 ALJR 384, [28].

irrelevant evidence is rejected because any argument favouring its use will be anathema to the rationalist tradition. Notably, section 56(2) is not subject to any exceptions in the uniform evidence law.

That being said, the rejection of irrelevant evidence cannot prevent a court from considering some irrelevant information. Fact-finders are people with lives independent of a court room and, accordingly, will carry both relevant and irrelevant information into the proceedings with them. Moreover, courts cannot exercise total control over events within the proceedings, so fact-finders will often be aware of irrelevant matters such as the appearance of the parties, the character of their lawyers, and so on. In some cases—such as where a trial has been the subject of discussion in the media—further steps may be taken to discourage reliance on irrelevant facts. For example, when the English Court of Appeal ordered a new trial after learning that the jury had used a ouija board, it banned the publication of its reasons until after that trial, so that the new jury would not learn what answers the deceased supposedly gave during the séance.

A further aspect of evidence law's discouragement of irrationality is the regulation of the 'risk of unfair prejudice' of evidence, the irrational twin of the concept of the 'probative value' of evidence, mentioned earlier. The concept of prejudice was explained by the Australian Law Reform Commission in the following way:

> By risk of unfair prejudice is meant the danger that the fact-finder may use the evidence to make a decision on an improper, perhaps emotional, basis, i.e. on a basis logically unconnected with the issues in the case. Thus evidence that appeals to the fact-finder's sympathies, arouses a sense of horror, provokes an instinct to punish, or triggers other mainsprings of human action may cause the fact-finder to base his decision on something other than the established propositions in the case. Similarly, on hearing the evidence the fact-finder may be satisfied with a lower degree of probability than would otherwise be required.[15]

In other words, evidence is prejudicial when it creates the risk that the fact-finding process may become emotional instead of rational and objective; when it may direct the fact-finder's attention towards issues logically unconnected with the questions to be decided at trial; or when it may make the fact-finder antipathetic to one of the parties.

An example is an incident from the same matter where the jury used a ouija board. A crucial issue in that trial was whether a double murder was committed by a lone killer (as the prosecution claimed) or a pair of killers (as the defence claimed). One piece of evidence was a tape where the footsteps of the killer(s) could be heard. Unfortunately, the tape was a recording of an emergency call made by one of the victims, who had already been shot in the jaw. Horrifically, she was unable to speak and was audibly shot again while the oblivious operator dismissed the call as a child's prank. When one juror realised what she would be asked to listen to, she asked to be excused from the jury. The judge dismissed the entire jury, replacing it with the one that tried to commune with a victim.

Because prejudicial evidence has a tendency to bypass the intellect, a judicial warning not to reason irrationally may not be effective. Drastic measures such as dismissal of the

15 Australian Law Reform Commission, *Evidence (Interim)*, Report No 26 (1985) Volume 1, [644].

jury or preventing the jury from hearing the evidence at all may therefore be the only method of ensuring that the evidence does not distort the fact-finding process. In the case of the victim's emergency call, the judge chose to edit out the most horrific parts of the tape, but otherwise allowed the tape to be played, because of its importance to both sides' cases.

1.1.1.4 Unreliable information should be treated with caution

Some commentators support the notion that the only role of evidence law is to facilitate the use of relevant information and its rational use by the fact-finder. In other words, there should be 'free proof', at least in one of the senses that that term is used.[16] If this approach were followed, then evidence law would be much less complicated than it is (and discussions of evidence law would focus more on the nature of rational fact-finding). An example is the following provision, applicable to racketeering prosecutions in South Africa:

> The court may hear evidence, including evidence with regard to hearsay, similar facts or previous convictions … notwithstanding that such evidence might otherwise be inadmissible, provided that such evidence would not render a trial unfair.[17]

That nation's Constitutional Court upheld this provision under its bill of rights, observing that 'Any judicial officer worth her salt should be perfectly placed to make the necessary value judgment.'[18]

However, the uniform evidence law, like the common law before it, is informed by a series of generalised value judgments about when fact-finders can—and, more importantly, cannot—be trusted to find the facts correctly. As Gageler J observes:

> When acknowledgement of the inherent uncertainty of the existence of a fact that is in issue is combined with acknowledgement of the inherent subjectivity of the process of finding that fact, scope emerges within the confines of accepted legal analysis for conceiving of at least some of the rules of evidence as measures serving a function of compensating for, or mitigating difficulties faced by, a tribunal of fact attempting to weigh some types of logically probative evidence. What emerges is the potential for conceiving of the existence and application of at least some rules of evidence as methods for correcting and improving the making of judgments of fact under conditions of uncertainty within the context of an adversary system—for conceiving of rules which Dixon sardonically described as archaic rules impeding a court's knowledge of the facts, as measures, which to the contrary, might serve to align the court's perception of what is likely to have occurred more closely with an objective (Bayesian) assessment of what probably occurred.[19]

This approach goes further than the other three principles discussed above, because it applies to information that clearly provides rational support for a particular conclusion

16 See W Twining, 'Freedom of Proof and the Reform of Criminal Evidence' (1997) 31 *Israel Law Review* 439, 447–8.

17 *Prevention of Organised Crime Act 1998* (SA), s 2(2).

18 *Savoi v National Director of Public Prosecutions* [2014] ZACC 5, [69].

19 S Gageler, 'Evidence and Truth' (2017) 13 *The Judicial Review* 249.

but where that conclusion is nonetheless attended by significant doubt. Even putting aside its horrifying content, the tape of the victim's emergency call may fall into this category, because of the obvious difficulties in using an audio tape of distant footsteps to determine how many people were present at a crime scene.

There are really two ways to treat unreliable evidence cautiously. The first method is to admit it, but to alert the tribunal of fact to the dangers of acting on it. The second is simply to exclude the evidence. As a general proposition, one can argue that the first of these methods provides the best way of dealing with unreliable evidence. This is because it is difficult to see how depriving the court of relevant information can possibly promote accurate fact-finding. Admitting the evidence but alerting the jury to the dangers of acting on it, on the other hand, would seem to accord both with the principle that relevant information should be admitted and with the principle that unreliable information should be treated with caution.

Exclusion may, however, be justified in either of two ways. The first is to argue that a jury is simply not to be trusted with unreliable information; better to exclude it altogether than to run the risk that the jury will give it a weight that it does not deserve. Although this belief undoubtedly played a role in the development of the law of evidence, the law's traditional mistrust about the ability of juries to accurately assess the weight that should be given to particular types of evidence is obviously difficult to reconcile with the oft-made comments about the exceptional aptitude of the lay jury for the task of fact-finding. When evaluating the law of evidence it is, therefore, important to keep in mind the following question: is the exclusion of this evidence more likely to promote or impede accurate fact-finding? An example of this vexed problem is the use of expert witnesses. For example, the prosecution in the ouija board case called a person who claimed to have expertise in interpreting the sound of footsteps. The opinion rule and its exception for specialised knowledge (discussed in **Chapter 7: Opinion**) grapples with the question of whether such evidence is more likely to assist the jury (with expert knowledge the jury lacks) or to impede it (by potentially exposing it to quackery).

The second justification for exclusion may be that there is some aspect of the evidence that makes it particularly difficult for anyone, including a jury, to assess objectively. For example, if a jury learns that the defendant confessed, it may be extremely difficult for the jurors to put this out of their minds, even if they also hear evidence suggesting that the confession was procured by coercion and is therefore likely to be unreliable. In other words, the mere fact that a confession was made may make it difficult for the jury to accurately weigh the evidence against the defendant.

The common feature of these justifications is their dependence on assumptions about psychology. 'When creating a rule of evidence', Gageler J quotes from a recent book, *The Psychological Foundations of Evidence Law*, 'the rulemakers often, and unavoidably, must act as applied psychologists. The rules of evidence reflect the rulemakers' understanding—correct or incorrect—of the psychological processes affecting witnesses and the capabilities of factfinders.'[20]

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20 S Gageler, 'Evidence and Truth' (2017) 13 *The Judicial Review* 249, quoting M Saks & B Spellman, *The Psychological Foundations of Evidence Law*, 2016, New York: NYU Press, 1.

1.1.2 Competing goals

Although none of the uniform evidence Acts have a meaningful purpose clause, such a clause does exist in New Zealand's modern evidence statute:[21]

> The purpose of this Act is to help secure the just determination of proceedings by—
>
> **(a)** providing for facts to be established by the application of logical rules; and
> **(b)** providing rules of evidence that recognise the importance of rights affirmed by the *New Zealand Bill of Rights Act 1990*; and
> **(c)** promoting fairness to parties and witnesses; and
> **(d)** protecting rights of confidentiality and other important public interests; and
> **(e)** avoiding unjustifiable expense and delay; and
> **(f)** enhancing access to the law of evidence.

Similar purposes (perhaps substituting common law rights for those referred to in sub-section (b)) are reflected in Australia's uniform evidence law. What is potentially controversial is the claim that the first of these purposes (which is concerned with establishing the facts) could be limited to an extent by the other purposes (which are concerned with other issues of justice and fairness).

For example, L'Heureux-Dubé J of the Canadian Supreme Court often asserted this view:

> One cannot over-emphasize the commitment of courts of justice to the ascertainment of the truth. The just determination of guilt or innocence is a fundamental underpinning of the administration of criminal justice. The ends of the criminal process would be defeated if trials were allowed to proceed on assumptions divorced from reality. If a careless disregard for the truth prevailed in the courtrooms, public trust in the judicial function, the law and the administration of justice would disappear. Though the law of criminal evidence often excludes relevant evidence to preserve the integrity of the judicial process, it is difficult to accept that courts should ever willingly proceed on the basis of untrue facts.[22]

However, the contemporary law of evidence cannot be exclusively explained on the basis of the goal of promoting accurate fact-finding. Rather, other interests that compete with that goal do have an impact on the law of evidence, even causing courts to allow fact-finding to occur on the basis of untrue—or at least misleadingly incomplete—facts. The discussion below divides those interests into two groups: first, those protecting the capacity of the courts to function; second, those protecting other public interests.