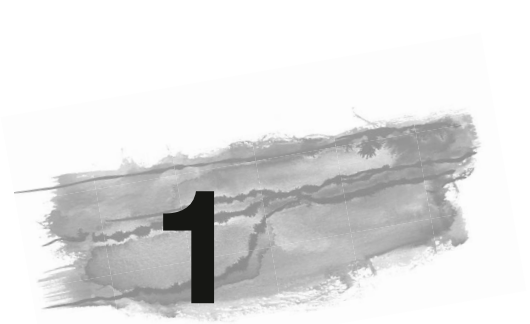

1 UNIFORM EVIDENCE LAW

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.

1.1.2.1 The proper functioning of the courts

Even L'Heureux-Dubé J concedes that sometimes relevant evidence must be excluded to 'preserve the integrity of the judicial process'. The variety of different fact-finding scenarios sometimes demands highly complex and subtle rules to facilitate the goal

21 *Evidence Act 2006* (NZ), s 6.

22 *R v Noël* (2002) 218 DLR (4th) 385, 427, affirming a passage in *R v Howard* [1989] 1 SCR 1337, 1360.

of accuracy; however, excessive complexity in a law that regulates the day-to-day operation of the courts would ultimately hamper the very justice system that the evidence law is meant to serve. The impossibility of framing a rule in advance that is sufficiently robust to deal with all factual scenarios leaves the courts and legislatures with two alternatives.

One is to frame broad-brush rules that are broadly supportive of accurate fact-finding but sometimes hamper the accuracy of fact-finding in individual trials.[23] The other is to leave matters largely to the discretion of individual trial judges, with the inevitable result that the goal of promoting accurate fact-finding will be pursued in a variety of different—and possibly inconsistent—ways.[24] The former approach was supported by Attorney-General Hulls when introducing Victoria's Bill to enact the uniform evidence law:

> [T]he parties must be given, and feel they have had, a fair hearing. To enhance predictability, the rules should be clear to enable preparation for, and conduct of, trials and tend to minimise judicial discretion, particularly in the rules governing the admissibility of evidence.[25]

However, as this textbook will demonstrate, the uniform evidence law, much like the common law, involves a mixture of both approaches.

In 2014, the High Court confronted these tensions in a case concerning the common law rule barring the use of evidence of jury deliberations.[26] The rule seeks to ensure that jurors can speak frankly and to preserve the finality of verdicts. As well, it relieves courts from the need to make fraught inquiries into events in the jury room, for example determining why a note was left in a jury room stating that one of the jurors had been 'physically coerced' into reaching a guilty verdict. In the past, the courts have applied the rule in rigid ways, barring all evidence of what happened in the jury room (such as physical coercion), while allowing evidence of 'extrinsic' events (such as jurors using a ouija board while staying overnight in a hotel).

However, in *Smith v Western Australia*,[27] the High Court took a more flexible approach that recognised that events that 'cast a shadow over the administration of justice' (such as the spectre of physical coercion) should always be characterised as extrinsic to deliberations and hence outside the scope of the rule. In doing so, the Court prioritised the goal of accurate fact-finding (and, in particular, the reduction of artificial barriers to ascertaining what happened) over the goals of insulating jurors, courts and the criminal justice system from the costs of trying to learn (and perhaps succeeding in learning) what occurs inside the jury room.

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23 See, for example, the discussion of Kirby J in *Smith v The Queen* [2001] HCA 50; (2001) 206 CLR 650.

24 See especially the discussion in **Chapter 16: Discretionary and Mandatory Exclusions**.

25 R Hulls, *Parliamentary Debates (Hansard)*, Legislative Assembly, 56th Parliament, 1st session, Book 9, 26 June 2008, 2663.

26 Preserved under the uniform evidence law by s 9(2)(a) (and see s 129(4) for a narrower form of the rule that does not apply in appeals).

27 [2014] HCA 3; (2014) 88 ALJR 384.

Predicting a rule's workability is no easy task. In *Smith*, the High Court stated:

> Any doubt or ambiguity as to the true meaning of the note might be resolved relatively easily by inquiry of the juror who made the note. An inquiry may reveal, either that the 'physical coercion' referred to in the note was no more than robust debate, or that whatever pressure was described, it had, in truth, no real effect upon the decision of the juror who wrote the note … [I]t cannot be assumed that the inquiry would be 'wide-ranging and intrusive … into the deliberations of the jury, [involving] the interrogation of all twelve members of the jury'. Finally, it is to be noted that the respondent did not suggest that the passage of time means that it would now be futile to order such an inquiry; but the practicability of an inquiry, given the lapse of time since the verdict, is a matter for determination by the Court of Appeal.[28]

But these hopes were dashed. The juror—once he was located and made to testify, neither of which was easy—testified that he was indeed threatened with violence if he maintained that the defendant was not guilty. Western Australia's Court of Appeal was forced to call the remaining eleven jurors to testify and be cross-examined. And the passage of time made the task difficult, with many jurors forgetting such remarkable details as the fact that the prosecutor in their case was blind. Ultimately, the Court relied on the absence of confirmation of the juror's account by most of the others to reject it. 'The shadow of injustice has been dispelled', or so the judges hoped.[29]

In *Smith*, the High Court did make one concession to the practicalities of administering justice, ruling that the fact that the foreman's original note was obviously hearsay was not a bar to its use on appeal:

> The note did not become part of the record in consequence of being tendered by either party; but neither party objected to receipt of the note as part of the record. In the proceedings in the Court of Appeal and in this Court, no objection was taken to the note on the ground that it was hearsay. Given these circumstances, the question is not whether it is inadmissible as hearsay, but whether it has any probative value.[30]

New South Wales courts have similarly interpreted the uniform evidence legislation itself in a way that prioritises the practicalities of administering justice over concerns about accurate fact-finding. In *Perish v The Queen*,[31] the prosecution presented a second-hand account of the defendant's words to prove his intent to kill the deceased. On appeal, the defence's lawyer swore that 'I did not turn my mind to the fact that the evidence… was second hand hearsay and may have been rejected had I objected to it.' However, the Court of Criminal Appeal rejected an appeal on this ground, instead endorsing earlier NSW and Federal Court authorities ruling that the word 'admissible' in the legislation should be read as 'admissible over objection', a reading that would avoid numerous appeals (and arguments over whether the failure to object was a

28 *Smith v Western Australia* [2014] HCA 3; (2014) 88 ALJR 384 [65]–[67].
29 *Smith v Western Australia [No 2]* [2016] WASCA 136, [435].
30 *Smith v Western Australia* [2014] HCA 3; (2014) 88 ALJR 384 [57].
31 [2016] NSWCCA 89.

forensic decision.) However, Victoria's Court of Appeal has said that it is 'reluctant' to follow this approach and has noted that 'none of the New South Wales authorities countenance the reliance upon evidence that is not relevant to any fact in issue'.[32]

1.1.2.2 Other public interests

Reference to goals other than the promotion of accurate fact-finding and the preservation of the courts in Australian evidence law is much more contentious. Evidence law's characterisation as 'procedural' law suggests that it is not an appropriate vehicle for the pursuit of public interests (other than accurate fact-finding by a functioning court system).

In 1999, the High Court considered an argument that the paramountcy principle of family law—that the best interests of children is the 'paramount consideration' in curial decision-making about parenting—applied to the law of evidence. The majority rejected the view that rules about use or procedure should be read as subject to the best interests of children:

> The 'paramountcy principle' is a principle to be applied when the evidence is complete. Except where statute provides to the contrary, it is not an injunction to disregard the rules concerning the production or admissibility of evidence.[33]

Kirby J dissented, referring (among other considerations) to the international *Convention on the Rights of the Child*, which 'makes no artificial distinctions between a final judicial decision affecting the interests of a child and interlocutory decisions anterior to such a final decision'.[34]

The debate over the role of broad public interests in the formation and application of rules of evidence is an aspect of a wider debate about the function of the courts in promoting public welfare. In nations that provide citizens with constitutional protections from particular investigative conduct, courts typically regard their function as including the use of evidence law—specifically the exclusion of improperly obtained evidence—to vindicate individual rights or to deter their breach. This contrasts with Australia—one of the few comparable nations without entrenched constitutional rights regulating state conduct—where the equivalent rule of evidence tends to be justified on the narrower basis of preventing the courts from being tainted by impropriety, an approach that must be balanced against the illegitimacy that would flow from inaccurate fact-finding.[35]

One established area where other public interests do sometimes override the goal of accurate fact-finding is when it is in the public interest to maintain the confidentiality or secrecy of a particular type or item of information. In particular, the entire law of privilege involves the withholding of relevant information from the tribunal of fact on the basis that this is required by one or other aspects of the public interest.[36]

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32 *Velkoski v The Queen* [2014] VSCA 121, [200]; *Gill v The Queen* [2016] VSCA 261, [40].

33 *Northern Territory v GPAO* [1998] HCA 8; (1999) 196 CLR 553, [198].

34 Ibid, [231].

35 See **Chapter 16: Discretionary and Mandatory Exclusions**, [**16.5.3**].

36 See **Chapter 14: Privileges**.

For example, client legal privilege is based on the idea that confidentiality in the lawyer–client relationship is so fundamental to the effective administration of justice that the public interest in the administration of justice requires that the confidential communications between lawyer and client be protected from disclosure in court. Note that this important example of a compromise of the goal of promoting accurate fact-finding occurs in a context that is very closely tied to the proper functioning of the justice system.

But how are conflicts between these other interests and those of accurate fact-finding managed? The options are the same as other parts of evidence law that aim to balance free proof and concerns about prejudice or unreliability: prioritising one or the other interest, creating targeted exceptions to a general rule or relying on judicial discretion to strike the balance. The uniform evidence law adopts different approaches for different interests, but the courts sometimes resist the legislature's chosen approach. In 2014, Victoria's Court of Appeal baulked at a provision that created an exception to legal professional privilege for criminal defendants, saying:

> Plainly enough, if defence counsel could investigate without restriction the contents of any relevant privileged communication of which any prosecution witness had knowledge, LPP in the context of criminal proceedings would be virtually destroyed. As already mentioned, the Court would not conclude that such a step had been taken unless the legislature had declared in the clearest terms its intention to do so. The legislative record contains no such indication.[37]

The Court applied the 'principle of legality' to read the provision in what it admitted was a strained way to preserve the common law privilege for prosecutors. In the authors' view, such readings entirely neglect both the opposing interest of ensuring a fair trial to defendants (in particular, by ensuring that relevant information is before the court) and the legislature's decision to strike that balance in a different way to the common law.

1.2 UNIFORM LAW

Just as the uniform evidence law's concept of 'evidence law' is entirely traditional, the notion of making such a law uniform across Australia is hardly radical. The previous common law of evidence was, after all, the same across Australia. Nevertheless, when the Australian Law Reform Commission was asked to review the law of evidence in Australia's federal courts (which at the time 'picked up' the law of the state they sat in), its Commissioners pronounced themselves amazed at the 'remarkable' differences in the law across Australia.[38]

The explanation was straightforward: first, the common law of evidence was full of uncertainties, derived largely from its unwritten nature and the chaos of fact-specific precedents. Second, in response to both the uncertainties and the common

37 *Director of Public Prosecutions (Cth) v Galloway (a pseudonym)* [2014] VSCA 272, [9].

38 Australian Law Reform Commission, *Evidence (Interim)*, Report No 26 (1985) [93], [217].

law's antiquated nature, it had been modified by disparate local statutes that were not uniform and were themselves subject to differing interpretations.

The Commission's solution to both problems was a new evidence law statute, applicable in all federal and territory courts. Given the unsatisfactory state of the existing law, merely reducing it to statutory form would not suffice. Instead, the Commission recommended a simultaneous reform of the law, both to make it simpler to use and to respond to contemporary developments. The uniform evidence law project is, therefore, a classic exercise in grand-scale law reform.

Indeed, the goal of 'uniformity' may just be a clever way of marketing a series of abstract reforms that had no political constituency. The strained political case for the bulk of the reform package can be seen in the media releases and second reading speeches concerning the new laws, which emphasised a marginal reform—section 51's abolition of the 'original document rule'—which, it was claimed, would save 'businesses about $10 million a year'![39]

The uniform evidence law has clearly succeeded in terms of its take-up by significant Australian jurisdictions. Whether its reforms of the law of evidence are themselves successful is another matter that will be addressed throughout this book. This part evaluates the success of the uniform evidence law's broader goals of changing how Australian evidence law is applied, found and developed.

1.2.1 Application

One of the purposes of the uniform evidence law was to provide a single law for Australia's disparate legal proceedings, replacing the earlier trend of tribunals and some court proceedings being exempted from the law.

Section 4 governs the statutes' application. The key proposition in section 4(1) is that each statute applies to 'all proceedings' in a particular set of courts:

- the top court of each jurisdiction (the High Court and the Supreme courts)
- any other courts 'created by' each jurisdiction's parliament and
- any other person or body that exercises a law of that jurisdiction and 'is required to apply the laws of evidence'.

The second category has been held to be limited to a court 'created by Parliament as such', so it does not apply to a body that is called a court but has different functions, such as the NSW Coroner's Court.[40] The uniform evidence law also does not apply to executive decision-makers, but does apply to courts reviewing such decisions.[41]

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39 R Hulls, 'New Evidence Laws to Save Costs for Businesses', 24 June 2008. See also the second reading speech for the Evidence Bill 2001 (Tas), which concluded: 'Mr Speaker, the Evidence Bill paves the way for significant reforms to the application of evidence law in the courts. The bill will permit significant savings in government storage costs by enabling departments and statutory authorities to abandon storage of original documents after their microfilming or transfer to other modern storage media.'

40 *Decker v State Coroner (NSW)* [1999] NSWSC 369.

41 *Cabal v United Mexican States* [2001] FCA 427; (2001) 108 FCR 311.

The third category in section 4(1) excludes statutory non-court bodies that are expressed not to be bound by either the law of evidence or the (arguably narrower) 'rules of evidence'.[42] However, the exclusion does not apply in more nuanced situations. The full Federal Court has held that the uniform evidence law applies to court appeals against decisions by the Commissioner of Patents, despite laws empowering the appeal court to admit evidence that was considered by the Commissioner (who is not bound by the rules of evidence) and to 'admit further evidence orally, or on affidavit or otherwise'.[43]

The most important feature of section 4 is that it applies on a court-by-court basis, rather than to all proceedings heard within a particular jurisdiction. Thus, the *Evidence Act 1995* (Cth) applies to the federal court system, while each of the New South Wales, Norfolk Island, Tasmanian, Victorian, Australian Capital Territory and Northern Territory statutes applies in those respective court systems. This approach avoids the unpalatable prospect of courts in some Australian jurisdictions applying both the uniform evidence law and the common law. Instead, in Queensland, South Australia and Western Australia, the uniform evidence legislation only applies in federal courts, while the common law of evidence continues to apply in state Supreme and lower courts (even when those courts are trying federal matters).

But this feature is complicated by the variety of things that courts do. Section 4's operation is limited to 'proceedings', so courts that do apply the uniform evidence law will not be bound by that law in some contexts that do not amount to proceedings. Some early judgments held that 'proceeding' (which is not defined) could cover non-adversarial inquiries, such as court examinations of corporate officers;[44] however, a somewhat later view is that the uniform evidence law only applies in disputes between parties where evidence is presented.[45]

Also, while section 4(1) includes bail, interlocutory, chambers and sentencing matters in the definition of 'proceedings', there are statutory exemptions for:

- appeals to federal courts (including the High Court) from courts that are not bound by the uniform evidence legislation[46]
- interlocutory matters, where courts retain their common law power to dispense with the rules of evidence as necessitated by the circumstances[47] and
- sentencing matters, unless the court directs otherwise in the interests of justice (including when a party applies for a direction in relation to proof of a fact that will be significant in determining a sentence).[48]

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42 *Epeabaka v Minister for Immigration & Multicultural Affairs* (1997) 76 FLR 101.

43 *Commissioner of Patents v Sherman* [2008] FCAFC 182; (2008) 172 FCR 394.

44 *Re Interchase Corp Ltd* (1996) 68 FCR 487.

45 *Griffin v Pantzer* [2004] FCAFC 113; (2004) 137 FCR 209.

46 Section 4(5) of the *Evidence Act 1995* (Cth).

47 Section 9.

48 Section 4(2)–(4).

The latter exemption curiously may mean that the common law of evidence will typically apply in most sentencing matters throughout Australia (albeit in an attenuated form due to the informality of those proceedings).[49]

The uniform evidence law purports to continue the common law tradition of setting out a single set of rules applicable to all proceedings, rather than different rules for different types of proceedings. However, this position is undermined by other statutes that exclude particular parts of the statutes for entire categories of proceedings. Notably, section 69ZT of the *Family Law Act 1975* (Cth) excludes many of the rules of evidence (including all of use rules discussed in Part 3 of this book other than relevance, privilege and discretionary exclusion) in 'child-related proceedings' unless the court deems the circumstances to be exceptional. The Australian Law Reform Commission, commenting on this exclusion, observed that the policy 'that the uniform Evidence Acts should remain Acts of general application' made it appropriate for policy questions particular to some proceedings to be resolved 'outside of the rubric of the uniform Evidence Acts'.[50] In 2011, the Full Court of the Family Court rejected a submission that:

> the effect of s 69ZT is to establish a rule of general application that in cases where a court is asked to terminate a child's relationship with a parent, a judge would err if he or she failed to apply the rules of evidence excluded by s 69ZT(1) of the Act to an issue or to the entire hearing. It must be remembered that it is not uncommon for such cases to involve, in effect, a risk assessment exercise which may not include consideration of whether to make positive findings of sexual abuse or consider conduct which would constitute criminal offences in the upper range of seriousness. There are sound reasons associated with the protection of children and victim partners why, notwithstanding an order is sought to terminate a child's relationship with a parent, a judge might determine the risk issue by reference to ss 69ZT(1) and (2) of the Act.[51]

Despite this, the trial judge in the same case ultimately held that the rules of evidence should apply to resolve a dispute about domestic violence, observing:

> It could be asked rhetorically, what mischief would be likely to arise from the application of the rules of evidence? None has been suggested. That is unsurprising, as the provisions of the Evidence Act facilitate rather than impede the receipt of evidence probative of facts or issues in dispute, and guard against the receipt of 'evidence' which could not safely or fairly do so.[52]

He added that applying the rules of evidence would reduce the possibility of his findings being overturned on appeal. The parties agreed that, despite legislative permission in section 69ZT, it would be overly complex to apply the uniform evidence law only in part to the hearing.

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49 *R v Bourchas* [2002] NSWCCA 373; (2002) 133 A Crim R 413, [39]–[61]; *Talukder v Dunbar* [2009] ACTSC 42; (2009) 194 A Crim R 545, [19].

50 Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102 (2005) [20.74].

51 *Maluka & Maluka* [2011] FamCAFC 72, [123].

52 *Maluka & Maluka* [2012] FamCA 373, [38].

The claim that the uniform evidence law is 'of general application' is debatable regardless. Reflecting heightened concerns about the accuracy of fact-finding in criminal trials, many of the legislation's provisions are either limited to prosecution evidence in criminal proceedings or have a stricter application to such evidence. Moreover, many of the rules that do apply in civil proceedings may be dispensed with by a court (in relation to matters not 'genuinely' in dispute or where the rules would 'cause or involve unnecessary expense or delay') without the consent of one or both parties.[53] It would be more accurate to describe the uniform evidence law as setting out two overlapping sets of rules: a broad and stricter set for criminal proceedings (and, in particular, prosecution evidence) and a narrower and more discretionary set for civil proceedings.

1.2.2 Development

In contrast to some other national uniform schemes in Australia (such as the Australian Consumer Law), there is no single text of the uniform evidence law. Rather, responsibility for the law is shared between each legislature in each adopting jurisdiction. The goal of uniformity depends on the adoption of identical statutes by each parliament and adherence to a coordinated process for amending those statutes. To date, both features of the uniform evidence law have been only partially successful.

As noted earlier, uniform evidence statutes are now in force in seven out of Australia's ten legislatures, but adoption is not on the agenda in the remaining three.[54] The seven statutes are actually all different, although the differences are mostly relatively minor. For example, Tasmania eschews the approach of having an appendix 'Dictionary' of key terms, Victoria refers to a criminal defendant throughout as 'the accused' and the Northern Territory has a non-uniform name. This treatise ignores these purely stylistic differences when extracting relevant provisions. However, differences of substance cannot be ignored and will be noted where relevant.

The uniform evidence legislation has undergone one major round of coordinated law reform, involving a unique joint law reform inquiry by the federal, NSW and Victorian bodies (with minor involvement by others), followed by endorsement of the reform package (albeit with slight changes) by the Standing Committee of Attorneys-General (SCAG). While marred by early enactment of some reforms in NSW,[55] delayed enactment of the entire package in Tasmania,[56] and minor divergences in other jurisdictions, the process was nevertheless a showpiece of what the uniform evidence law system can achieve in a federation. Alas, the commitment to uniformity has subsequently broken down in the face of local concerns, notably NSW's reduction of the 'right to silence' in early 2013[57] and Victoria's move to place provisions on jury directions in a separate

53 Section 190(3).

54 A Hemming, 'Adoption of the Uniform Evidence Legislation: So Far and No Further?' in A Roberts & J Gans (eds), *Critical Perspectives on the Uniform Evidence Law*, 2017, Sydney: Federation Press.

55 *Evidence Amendment (Confidential Communication) Act 1997* (NSW); *Evidence Legislation Amendment Act 2001* (NSW).

56 *Evidence Amendment Act 2010* (Tas).

57 *Evidence Amendment (Evidence of Silence) Act 2013* (NSW).

statute and to add special rules of evidence protecting homicide and rape victims.[58] The recent Royal Commission into Institutional Responses to Child Sexual Abuse is likely to prompt the adoption of much more significant modifications to the scheme's core rules on tendency and coincidence evidence, without any role for law reform commissions and a distinct likelihood of significant divergence between jurisdictions.[59]

The development of evidence law is not only shared among Australia's parliaments but also among each jurisdiction's courts, who both interpret the law and apply it. The involvement of courts can undermine uniformity in two respects. First, a number of key provisions have, at times, acquired different meanings in different courts. The most notable example was a sharp divergence in the interpretation of a core term in the uniform evidence law—probative value—between the top courts of NSW and Victoria, that was only settled by the High Court in 2016.[60] Divergences may also occur due to different rules of statutory interpretation in each jurisdiction.[61] Second, different practices in discretionary decision-making can lead to effectively different evidence law systems across jurisdictional boundaries and even within particular courts.

In theory, the High Court, as the ultimate appellate court in Australia, should be a centripetal force in the interpretation of the uniform evidence law. However, in the early days, some of its judges issued vehement criticisms of the new law from the Bench:

> As an Act which had as one of its purposes the clarification and simplification of evidentiary questions, it has had at best mixed success. Far too often this Court has had to decide questions arising under it, for which in the past, common law, or earlier well understood statutory provisions provided the answer. The number and complexity of those cases exceed what might ordinarily be expected in respect of even a new and significantly changed legislative regime.[62]

In turn, a number of the Court's decisions on the new law (and parts of the surviving common law) were specifically reversed in the 2007 round of law reforms. Whatever the substantive merits of those amendments, they have reduced the useability of the legislation, due to both more complex statutory provisions and the loss or reduced utility of a decade of High Court rulings.

More recently, the Court has resolved key disputes between NSW and Victoria on the meaning of the law, but by narrowly divided decisions that seem to pose justices from NSW against justices from Victoria. The Court's key judgment from 2016 on the meaning of 'probative value' is cryptic both in its statement of the law and its application

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58 *Jury Directions Act 2015* (Vic); *Evidence Act 2008* (Vic), ss 66(2)(b)(ii), 137(d).

59 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report*, 2017, Recommendation 45.

60 *IMM v The Queen* [2016] HCA 14.

61 Notably, the federal and ACT statutes are subject to a stronger rule on purposive interpretation (*Acts Interpretations Act 1901* (Cth), s 15AA; *Legislation Act 2001* (ACT), s 139) than the rule that applies in the remaining jurisdictions.

62 *Dhanhoa v the Queen* [2003] HCA 40; (2003) 217 CLR 1, [89] (per Callinan J).

of it, while its 2017 judgment on the controversial topic of tendency evidence in sexual offence matters has still not settled fundamental questions about how that part of the law operates.[63]

1.2.3 Accessibility

Arguably, the major advantage of the uniform evidence law is that it is an uncommonly clear and readable statute, not only in comparison to the unwritten common law or to other evidence law statutes, but to other statutes more generally. Accessible features include:

- a clear structure of chapters, parts and divisions
- express references to rules and exceptions to those rules
- relatively few lengthy provisions
- a dictionary of commonly used terms
- extensive use of notes, providing examples and cross-referencing
- a system for common numbering of provisions in the various jurisdictions' statutes
- a diagram of the main rules of admissibility.

As will be outlined in this book, the law has also been made significantly more useable through simplification.

Despite this, the statutes routinely trip up even the most experienced users. For example, a decade after the Commonwealth statute was enacted, Heerey J interpreted section 79's 'specialised evidence exception' as barring evidence on matters of common knowledge, unaware that he was resurrecting a common law notion expressly discarded by the uniform evidence law in section 80(b); the result was years of further proceedings.[64] The same judge himself later noted practitioners' penchant for continuing to cite the well-known common law judgment of *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336, instead of its statutory replacement in section 140(2).[65] Heerey J mocked this approach (and perhaps himself) by putting the phrase 'Isn't there something in the *Evidence Act* about this?' in his judgment's headnote. This phenomenon continues even now in jurisdictions such as Victoria, which joined the scheme well into its lifespan.[66]

Three features of the uniform evidence law limit its accessibility. The first is the inaccessible nature of its subject-matter. Despite their name, many of the so-called 'rules of evidence' do not regulate evidence as such, but rather particular uses that a court might make of certain items of evidence. A deep understanding of rational fact-finding—a matter not typically addressed in statutes, cases, treatises or law

63 *IMM v The Queen* [2016] HCA 14, see especially [50]; *Hughes v The Queen* [2017] HCA 20. See [**12.1.3**].

64 See *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd* [2009] FCAFC 8; (2009) 174 FCR 175 and earlier judgments in those proceedings.

65 *Granada Tavern v Smith* [2008] FCA 646, [96]; (2008) 173 IR 328.

66 For example *Schanker v The Queen* [2018] VSCA 94.

courses—remains an indispensable prerequisite to any understanding of the rules of evidence. Unfortunately, this feature of evidence law is obscured by the recurrent references to 'admissibility' in the legislation, implying that rules such as the hearsay, opinion, credibility, tendency and coincidence rules are concerned with whether or not a court will learn of a particular item of evidence, instead of whether the court is permitted to make a particular use of that evidence. Users of the uniform evidence law would be well served by replacing the word 'admissible' with 'useable' throughout the statute.

Second, the statute's rigidly logical structure itself poses a challenge. The statute often addresses single issues with multiple interlocking rules that make little sense when considered separately and that can be easy to miss without a close reading of the whole statute.[67] Important examples include the crucial role of the Dictionary (including clauses buried at the end of it) in understanding particular regimes (such as hearsay exceptions) and the complex rules on when a witness's prior statements can be used by the court. Except to those least daunted by reading complex statutes, the accessibility of the statute depends, at least in part, on annotations, textbooks and expository judgments. This treatise uses flowcharts to make some of the interactions more accessible, although (as can be seen) this approach has its limits and is no substitute for the prose.

Finally, the goal of uniformity is itself somewhat at odds with the process of regular refreshing that is often necessary for often-used statutes. The uniform evidence legislation was drafted in part to overcome the inaccessible nature of earlier evidence statutes that were weighed down by a history of tinkering with and responding to now-forgotten issues, their use of outdated terminology and their accretion of judicial glosses that ameliorate some of their flaws. Alas, the 2007 round of reforms of the statutes had a similar piecemeal nature, with the law reform commissions recommending specific reversals of flawed judgments and corrections of earlier bad drafting, but eschewing complete rewrites of provisions and divisions that the courts had reinterpreted to make them workable. This approach is unsurprising, as great changes would have provoked a backlash from practitioners and judges who had made the effort to get used to the existing provisions. But the result is that the Northern Territory in 2011, while purporting to enact a cutting-edge, model statute, actually adopted a decades-old law that had gone slightly to seed. While the *Evidence (National Uniform Legislation) Act 2011* (NT) is undoubtedly a major improvement on the seventy-year-old *Evidence Act 1939* (NT), not to mention the centuries-old common law, it is nevertheless a less modern and more difficult statute than New Zealand's *Evidence Act 2006*. The latter not only benefited from avoiding the mistakes of the Australian law, but has been amended much more regularly in response to recognised omissions, court decisions and new developments.

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67 For example *Hawker v The Queen* [2012] VSCA 219, [27], where the Court of Appeal castigated a trial judge and lawyers for 'proceed[ing] on the erroneous footing that s 13'—the uniform law's test for competence—'could somehow render [a pre-trial] witness statement inadmissible', apparently unaware that s 61 (a provision concerning the use of hearsay in a separate Chapter of the statute) expressly provides for that possibility.

1.3 OTHER LAWS

Despite its goal of a fresh start on evidence law, the uniform evidence law is not a code. Rather, like all statutes, it operates and must be understood in the context of myriad other laws. This part briefly outlines the effect or influence of four sets of laws that sit outside of the uniform evidence law.

1.3.1 Local statutes

Section 8 of each of the statutes provides that the statute 'does not affect the operation of the provisions of any other Act'. So, all other *statutory* rules of evidence in a particular jurisdiction override that jurisdiction's uniform evidence law, whether they were enacted before that law or after it.

This approach reflects the fact that the uniform evidence law is not a comprehensive evidence law. Its drafters were well aware that Australia's statute books are replete with specific rules of evidence where consensus across jurisdictions was unlikely (for example, rape shield laws and recording requirements for confessions) or that were specifically for particular subject-matters (such as unique rules for corporate law and family law). Including such rules in the uniform evidence law would have damaged both its chances of widespread adoption and its claim to be a general law of evidence. That being said, excluding them means that the goals of unifying and simplifying Australia's evidence law, and in particular the aim of making the law more accessible, can only be achieved for part of that law.

The practical result of section 8 is that courts and lawyers need to look at all of their jurisdiction's statute books (as well as federal provisions, which may override state and territory ones) to fully determine questions of admissibility and procedure, even when those questions appear to be completely dealt with by the uniform evidence law. This task was made easier in some enacting jurisdictions by simultaneous legislation repealing or continuing many of the pre-existing local statutory rules.[68] Confusingly, some of those jurisdictions have preserved older evidence statutes also previously known as 'Evidence Acts', though these are neither comprehensive nor uniform. Variations on this approach include Tasmania's inclusion of local non-uniform laws within its uniform statute, and the Northern Territory's keeping the name 'Evidence Act' for its non-uniform statute and its adoption of a provision apparently modifying the effect of section 8.[69]

For statutory rules not expressly dealt with when the uniform evidence legislation was adopted (or enacted subsequently), courts must determine whether they override all or some of the uniform evidence law. Seemingly without reference to section 8, Basten JA has commented:

> The resolution of potential conflicts is to be achieved by general principles governing the reconciliation of different laws of the same legislature. Often it will be possible to read a provision having a general operation as subject to the requirements of a provision

68 For example, *Evidence (Consequential and Other Provisions) Act 1995* (NSW).

69 *Evidence Act 1939* (NT), s 6.

> having a limited and particular operation. Further, later provisions may qualify or limit the operation of earlier provisions which are not expressly varied.[70]

Categories of overriding laws include:

- statutes stating that some courts are not required to follow the rules of evidence;
- provisions that expressly disapply a provision of the uniform evidence law[71]
- statutes setting out rules that are implicitly inconsistent with sections of the uniform evidence law (such as new exclusionary rules or modifications of the standard of proof) and
- provisions that set out different rules from those provided for in the uniform evidence law (for example, an expert certificate regime that differs from section 177).

Despite section 8, it is also possible that some other laws will not survive the enactment of the uniform evidence law. The Federal Court has held that an earlier rule on confessions, not repealed by the Norfolk Island Legislative Assembly when it enacted the *Evidence Act 2004* (Norfolk Island), was nevertheless impliedly repealed by that enactment.[72] This ruling, while probably a sound reading of the Assembly's intentions, nevertheless seems inappropriate in light of section 8 and the beneficial nature of the provision in question.

1.3.2 Common law

Section 9 of the state and territory statutes provides that they 'do not affect the operation of a principle or rule of common law or equity in relation to evidence … except so far as this Act provides otherwise expressly or by necessary intendment'. Section 10 provides for a similar rule for a court's inherent power to control a proceeding (which, while often preserved in court or constitutional statutes, is nevertheless derived from the common law). According to Basten JA:

> The Evidence Act itself should not be understood as a special kind of statute. For example, it does not enjoy some quasi-constitutional status. Although it is no doubt true that some evidential provisions, particularly those giving rise to an estoppel, 'may have the effect of creating substantive rights as against the person estopped', a superior court should not readily conclude that rules of evidence constrain the scope of the court's inherent powers to prevent abuse of its processes.[73]

So, the common law of evidence and procedure (both as it existed and as developed subsequently by the High Court)[74] survives to an extent under the new state and territory statutes.

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70 *King v Muriniti* [2018] NSWCA 98, [27].

71 For example *Vexatious Proceedings Act 2008* (NSW), s 8(2)(c).

72 *McNeill v The Queen* [2008] FCAFC 80; (2008) 168 FCR 198, [41]–[79].

73 *King v Muriniti* [2018] NSWCA 98, [25].

74 *Meteyard v Love* [2005] NSWCA 444; (2005) 65 NSWLR 36, [118].

Unlike local statutes, the common law's survival depends on its compatibility with the rest of the uniform evidence law. On one view, the common law of evidence must always give way to rules in the new statutes that are expressed without qualification or that only allow for exceptions set out in the uniform evidence law, for example:

- section 12, providing that everyone is competent and compellable '[e]xcept as otherwise provided by this Act'
- section 56(1), providing that relevant evidence is admissible '[e]xcept as otherwise provided by this Act'
- section 56(2), providing that irrelevant evidence is inadmissible and
- section 59(1), providing that hearsay evidence is inadmissible.

A less strict approach would preserve contrary common law on the basis that generally expressed rules of evidence do not exclude the common law either 'expressly or by necessary intendment' (for example, the hearsay exception for admissions by predecessors in title).[75] This approach is arguably more faithful to the terms of sections 9 and 10, but is less faithful to the terms of the remainder of the uniform evidence law and the goal of providing a clear, accessible statute. A further alternative is the approach in New Zealand, where the common law's survival is subject to its consistency with the purposes and principles of the modernised statute.[76]

Sidestepping the above difficulties, some provisions of the uniform evidence law expressly preserve parts of the common law (or its statutory successors) on:

- evidence of jury deliberations in appeal proceedings[77]
- legal or evidential presumptions that are not inconsistent with the uniform evidence law[78]
- powers to dispense with the rules of evidence in interlocutory proceedings[79]
- parliamentary privilege[80]
- court powers with respect to abuse of process[81]
- judicial powers to warn or inform a jury.[82]

Other provisions expressly override the common law on, for example, corroboration[83] and warnings about forensic disadvantage due to delay.[84]

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75 *Butcher v Lachlan Elder Realty* [2002] NSWCA 237; (2002) 55 NSWLR 558, [15].
76 *Evidence Act 2006* (NZ), s 12.
77 Section 9(2)(a).
78 Section 9(2)(b).
79 Section 9(2)(c).
80 Section 10.
81 Section 11(2).
82 Section 165(5).
83 Section 164.
84 Section 165B(5).

Regardless of whether or not it continues to apply of its own accord, the common law remains enormously significant in understanding and applying the uniform evidence law. Some parts of the new law are codifications of the old, so that earlier decisions remain highly persuasive. Other parts of the law are designed to reject the common law, so the earlier law remains important in understanding the rejected approach. So long as the courts have the wisdom to recognise the difference between these two scenarios, the common law is undoubtedly the most useful comparative jurisdiction for the uniform evidence law. On the other hand, unthinking or reflexive recourse to the common law is probably the easiest way to misunderstand the new law, a danger that is quite real given that many current lawyers and most current judges were trained under the old law.

A particular danger of relying on the common law to inform the meaning of the new statutes is that it is easy to disagree on what the common law is (or was), with unfortunate results. For example, when the NSW and Victorian courts considered the meaning of the crucial term 'probative value', they agreed (wrongly, in the High Court's view[85]) that it bore the same meaning as the previous common law, but disagreed sharply on what the earlier law required.[86] As well, the drafters of the uniform evidence law sometimes proceeded on an understanding of the common law that later judges disagreed with, confounding their apparent intentions.[87] The High Court's earliest decision on the new law recognised the significant changes occurring in Australia's evidence law by firmly rejecting the use of the new law's discretions to resurrect rejected common law approaches and even developing the common law so as to bring the two systems closer together.[88] Subsequent decisions acted as a brake against change, interpreting provisions of the new statutes on the assumption that no major changes from previous approaches were intended.[89] However, more recently, a majority of the Court declared:

> The issue here concerning a trial judge's assessment of the probative value of the evidence in question arises in the context of a statute that was intended to make substantial changes to the common law rules of evidence. The statute's language is the primary source, not the pre-existing common law.[90]

The long-term trend must surely be declining attention to the common law, as a new generation reaches the bench.

1.3.3 Overseas law

Replacing the common law of evidence with a fresher, simplified and unified law is not unique to Australia. Indeed, although little known in Australia, the uniform evidence

85 *IMM v The Queen* [2016] HCA 14, [35], [95].

86 *Dupas v The Queen* [2012] VSCA 328; (2012) 218 A Crim R 507, [63].

87 *Dasreef Pty Ltd v Hawchar* [2011] HCA 21; (2011) 243 CLR 588, [109]–[111].

88 *Papakosmas v The Queen* [1999] HCA 37; (1999) 196 CLR 297; *R v Swaffield* [1998] HCA 1; (1998) 192 CLR 159.

89 *Cornwell v The Queen* [2007] HCA 12; (2007) 231 CLR 260, [58]; (2007) 232 CLR 138, [38]; *Lithgow City Council v Jackson* [2011] HCA 36; (2011) 244 CLR 352, [44]–[46].

90 *IMM v The Queen* [2016] HCA 14, [35], but see Nettle & Gordon JJ [144].

legislation has been adopted in four non-Australian jurisdictions, all in the Caribbean.[91] Indeed, the very first uniform evidence law jurisdiction was Barbados, which enacted an earlier draft of Australia's uniform law as its *Evidence Act 1994*, a year before the federal and NSW parliaments adopted the statute. The result is that some persuasive precedents exist for the Australian statutes not only in Barbados's own courts, but also in three supranational appellate courts: the Eastern Caribbean Supreme Court (which is an umbrella court for the other three Caribbean UEL jurisdictions), the United Kingdom's Privy Council (which serves as a final appeal court for those three nations) and the Caribbean Court of Justice (the newer body that replaced the Privy Council for several Caribbean nations, including the largest non-Australian UEL jurisdiction, Barbados).

Although both the context and content of the statutes partly differ from those in Australia, the latter two bodies have issued rulings that are relevant to Australia on the UEL's provisions on silence, the probative value of DNA evidence and the reliability of a mentally ill witness.[92] But the more dramatic effect has been in the reverse direction, with the Caribbean Court of Justice holding that the adoption of the UEL in Barbados includes the adoption of some key common law rulings of Australia's High Court, such as those on the unreliability of uncorroborated police evidence of confessions.[93]

In addition to such direct adoptions, similar broad reforms have occurred independently in almost all the major common law nations, many of which were either an inspiration for or inspired by Australian reforms. So, the loss to Australia's remaining common law jurisdictions as the common law is displaced is a corresponding gain to Australia's uniform evidence law jurisdictions, which now have access to increasingly rich sources of relevant comparative law. The main overseas laws of relevance to the uniform evidence law are:

- The United States of America's Federal Rules of Evidence: This set of rules, developed by academics and judges, promulgated in 1975, and since adopted in most US jurisdictions is the most obvious inspiration for the uniform evidence law, which directly copied many of its key reforms.
- The jurisprudence of the Canadian Supreme Court: Blessed with a different federal division of powers and an activist top court, Canada unified and modernised its common law without the aid of law reformers or parliaments. Many of the Supreme Court's landmark exercises in simplification of evidence law are similar to reforms in the uniform evidence law, but with the added benefit of lengthy reasons for judgment setting out their rationale, scope, future development and application in particular appeals.

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91 *Evidence Act 1994* (Barbados); *Evidence Act 2002* (St Lucia); *Evidence Act 2006* (British Virgin Islands); *Evidence Act 2011* (St Kitts & Nevis). See J Gans, 'The Uniform Evidence Law in the Islands' in A Roberts & J Gans (eds), *Critical Perspectives on the Uniform Evidence Law*, 2017, Sydney: Federation Press.

92 *Higgins v The Queen* [2004] UKPC 7, [23]–[26]; *Grazette v The Queen* [2009] CCJ 2 (AJ), [32]–[34]; *Milton v The Queen* [2015] UKPC 42, [18]–[22].

93 *Sealy v The Queen* [2016] CCJ 1 (AJ); *Edwards v The Queen* [2017] CCJ 10 (AJ).

- Law reform in England and Wales: While England is yet to take the plunge into comprehensive evidence law reform, its parliament has enacted a number of ground-breaking piecemeal reforms. The 1984 *Police and Criminal Evidence Act* was the inspiration for the uniform evidence law's provision on admissions, and its constantly updated codes of practice provide a very useful counterpoint to the Australian provisions on police procedures, including identification. Later statutory reforms to the rules on hearsay and character took their lead from the uniform evidence law, but go further than it in many respects.[94]
- New Zealand's *Evidence Act 2006*: New Zealand engaged in a parallel reform process to Australia's, albeit about a decade later. Given that, it should be no surprise that the New Zealand Act is both similar to and an improvement on the uniform evidence law. Not only do the New Zealand provisions provide guidance on the interpretation of often vaguer Australian ones, but New Zealand case law will likely eventually provide highly persuasive guidance on some of the common aspects of the two schemes. In a sense, there is now more uniformity in evidence law among jurisdictions bordering the Tasman Sea than among those sharing the Australian continent.

As with all comparative law, overseas statutes and judgments cannot simply be applied directly in the courts of Australia's uniform evidence law jurisdictions. Rather, caution is always needed due to differences, not only in the laws themselves, but in the systems in which they operate. Nevertheless, it would be equally wrong to apply Australia's reform statutes in a vacuum or only by reference to the common law they replaced. For this reason, this textbook addresses overseas comparisons alongside more traditional reference points.

1.3.4 Human rights law

A further body of law with a potentially significant influence on evidence law is human rights law. Human rights law is not a law of evidence, but rather a broad set of abstract principles for assessing laws and behaviour. Nevertheless, particular human rights—notably the rights to confrontation and against self-incrimination—are closely tied to parts of evidence law. Also, aspects of evidence law have a capacity to limit or promote a number of general rights including rights to privacy and a fair hearing. Reflecting this, modern Australian evidence law judgments occasionally refer to overseas documents and decisions on human rights, although such references are controversial in some quarters.

Two uniform evidence jurisdictions have enacted statutes that set out lists of human rights and require that all statutory provisions be interpreted in a way that is compatible with those rights,[95] raising the possibility that those jurisdictions' statutes may need to be read differently from the other five. The extent of the difference depends on complex

94 *Criminal Justice Act 2003* (UK).

95 *Human Rights Act 2004* (ACT), s 30; *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 32(1).

questions, including whether provisions of the uniform evidence law are incompatible with human rights and whether it is possible to read their terms differently. The ACT's *Human Rights Act 2004* and Victoria's *Charter of Human Rights and Responsibilities 2006* have the potential to diminish the uniformity of the Australian statutes, but may heighten the uniformity of the ACT, Victorian, Barbados and New Zealand statutes (due to their own bills of rights).[96] Conversely, the impact of these rights statutes, especially Victoria's Charter, may prove to be minimal due to numerous caveats on the rights they promote and their operative provisions.[97]

Domestic human rights statutes may nevertheless be relevant to the operation of the uniform evidence law in another way. Both the ACT and Victorian laws provide that it is unlawful for public authorities to act in a way that is incompatible with human rights.[98] These rules most likely do not apply to courts' powers and discretions under the uniform evidence law, but they may affect determinations of whether evidence gathered by police or other state bodies was gathered illegally or was otherwise tainted by impropriety (including determinations made in other jurisdictions). A precedent is the ruling of the Norfolk Island Supreme Court that breaches of New Zealand's human rights law by Australian and New Zealand police interviewing the defendant in Nelson would, if established, have significance for the application of the rules on the use of admissions in Part 3.4 and the exclusionary discretions in Part 3.11 of Norfolk Island's uniform evidence law.[99] However, as was the case with interpretation, the true effect of the rules about public authorities is uncertain and may well be blunted by caveats built into them to minimise their effect.[100]

The uniform evidence law itself requires reference to international human rights law in one provision. If evidence has been obtained illegally or improperly, then section 138(3)(f) states that courts determining whether the evidence should nevertheless be admitted must 'take into account' whether the evidence was obtained in a way that was 'contrary to or inconsistent with a right of a person recognised by the *International Covenant on Civil and Political Rights*'. Bell J has observed:

> The language of s 138(3)(d)–(f) of the Evidence Act generally and s 138(3)(f) specifically, together with the strong rights-protecting purpose of these provisions, make clear that improper or unlawful police conduct which is contrary to or inconsistent with the rights of persons under the ICCPR is an aggravating consideration when assessing the gravity of the impropriety or contravention.[101]

96 *Barbados Constitution*, Chapter III; *New Zealand Bill of Rights Act 1990* (NZ).

97 See J Gans, 'Evidence Law under Victoria's Charter: Rights and Goals—Part I' (2008) 19 *Public Law Review* 197.

98 *Human Rights Act 2004* (ACT), s 40B(1); *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 38(1).

99 *R v McNeill (Ruling No 1)* [2007] NFSC 2; (2007) 209 FLR 124, [189]–[198].

100 See J Gans, 'Evidence Law under Victoria's Charter: Remedies and Responsibilities—Part 2' (2008) 19 *Public Law Review* 285.

101 *Director of Public Prosecutions v Natale (Ruling)* [2018] VSC 339, [70].

Likewise, speaking of Victoria's rights statute, he has held: 'any violation of a Charter right should be regarded as serious as the violation itself represents damage to the administration of justice and the rule of law'.[102]

SUMMARY

- The uniform evidence law follows the common law tradition in terms of its basic goals. The primary purpose of the law of evidence is promoting accurate fact-finding, through rules informed by a set of principles:
  - Fact-finding should be rational.
  - Relevant information should be available to the court.
  - Irrational fact-finding should be discouraged.
  - Unreliable information should be treated with caution.

This primary purpose is subject to competing goals, including ensuring the proper functioning of the courts and a variety of other public interests.

- The scheme aims to reform Australian evidence law to fit a single, simple and contemporary model. However:
  - each statute only applies in a defined set of courts in each enacting jurisdiction and is not applicable in some proceedings and matters within those courts
  - the statutes' accessibility is hampered by the complexities of evidence law and the minimalist nature of coordinated law reform
  - there are differences in the statutes, including recent piecemeal reforms made or proposed in NSW and Victoria.
- The uniform evidence law is not comprehensive, but instead may be:
  - supplanted by local statutes
  - supplemented by the remaining common law
  - influenced by similar overseas laws
  - modified by human rights law.

102 *Director of Public Prosecutions v Kaba* [2014] VSC 52, [482].