CHAPTER 1

THE NATURE OF EVIDENCE LAW, ITS HISTORICAL FOUNDATIONS AND THE UNIFORM EVIDENCE ACTS

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> *"The recognition by the common law of the injustice of adhering rigidly to the rule applied by the trial judge in the trial of the appellants is illustrated by the large number of 'exceptions' recognised in particular circumstances. This has produced an unacceptably complex set of 'rules'. They are difficult for judges and trial counsel to remember and to apply with accuracy in the often stressful circumstances of a trial. Clearly, there is a need for a simpler set of rules that observe concepts rather than the wilderness of instances acknowledged by the courts in their so-called 'exceptions'."*
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> *Nicholls v R* [2005] HCA 1, [203], Kirby J

¶1.1 The nature of evidence law

Evidence law is the branch of law that defines the type of information that can be received by a decision maker — whether a judge sitting alone or a member of a jury — that may properly be used by the decision maker in the resolution of the factual issues in dispute in a case.

Information that can be received for this purpose is called "admissible". Information that is excluded is called "inadmissible" — it does not form part of the relevant inquiry. Thus, evidence law is largely concerned with distinguishing admissible from inadmissible information.

The process of distinguishing between helpful (admissible) and unhelpful (inadmissible) information is not something that is unique to the legal system. Indeed, people do it as part of their everyday affairs. Normally, it is intuitive and based on common sense and experience.

For example, if a person wants to know who won the 100m male sprint at the 2012 London Olympics, there is an almost infinite number of sources that could be identified to ascertain the answer. These include interviewing participants in the event, speaking to spectators, reading newspapers the day following the event, searching the internet, watching television footage or reading official reports about

the event. Depending on the source that is used, a different answer may be given. Spectators may have a different recollection to participants, and newspaper reports may differ from official reports. If this is the case, the person must then make a decision about which information seems to be the most credible.

A similar process occurs where a person is trying to ascertain the exact time that a morning train is scheduled to leave a particular railway station. To ascertain the time, the person can seek to consult friends and work colleagues, look for information in a newspaper or a public transport customer service centre, or try to get the information from the internet. Again, different avenues of inquiry could lead to different answers, and the person will usually make the decision based on which source seems the most reliable.

These everyday examples reveal a commonality of approach to fact-finding in both daily life and in the courts: the sources or types of information that might be used to answer the question must be identified (relevance); the sources or types of information must be ranked (based on considerations such as reliability and credibility); and the sources or types of information which are ranked too low may be rejected — only those which remain being used as part of the decision-making process. What information should, or must, be rejected is an important part of the task. For example, in relation to the 2012 London Olympics, it would be a waste of time to consult newspapers printed before the event, and it would be pointless asking people who obviously have no knowledge of the event. To ascertain the morning train timetable, it might be misleading to ask people who have no familiarity with the public transport system.

This intellectual process occurs each time a person looks for an answer or makes a decision, mostly unconsciously. However, as the decisions made by courts and tribunals must be logical and are open to scrutiny, the law of evidence prescribes a rational and consistent set of rules that decision makers must use to resolve factual disputes. Evidence law is, thus, the formalisation of the fact-finding inquiry that individuals perform as part of their everyday lives.

1.1.1 Evidence law is procedural, not substantive

Broadly, there are two types of rules of evidence.

First, there are rules regulating matters of process concerning *how* evidence can be given and *who* can give the evidence. Thus, there are rules dealing with matters such as competence and compellability of witnesses, and the reception of material in the form of documents and physical objects (eg a weapon used to commit an armed robbery).

Second (and this is generally the more complex area), there are rules prescribing what sort of information can be received by the courts to resolve issues in dispute. The most overarching rule is that only *relevant* evidence may be adduced. There are also many other rules designed to exclude the reception of specific forms of evidence — examples are the rules against *hearsay* and *similar* fact evidence.

Both types of rules serve the same purpose (ie controlling what information can be received by the decision maker), and both fall within the definition of the law of evidence.

The key distinction between the law of evidence and other areas of the law is that evidence is not substantive. Unlike the criminal law, tort law or the law of contracts (for example), it does not create legal rights or duties. By contrast, evidence law is procedural (or adjectival) in nature. It serves to lay down the process by which substantive legal issues are determined. The existence of evidence law is dependent upon the existence of substantive law. If there were no substantive areas of law; and there was no possibility of disputation concerning the rights and duties created by these areas of law, it would be futile having a law of evidence. The same cannot be said of substantive areas of law; a tort system of liability would still make sense and be functional in a world devoid of criminal law, contract law, and so on — and *vice versa*.

Although evidence law does not have a life of its own, it is crucial to the operation of substantive law. The determination of substantive rights occurs in the legal environment created by the adjectival law. As Jeremy Bentham said:

> "Of the adjective branch of the law, the only defensible object, or say end in view, is the maximization of the execution and effect given to the substantive branch of the law."[1]

Thus, a flawed system of procedural law has the potential to fundamentally undermine the operation of substantive law and thereby create injustice. How the rules of evidence can best ensure that the substantive law is properly executed and effective is obvious: evidence law must ensure that the substantive law (whatever area of law that may be) achieves accurate results. Thus, laws designed to provide for workers' compensation work best if, in fact, only workers are compensated; laws aimed to punish burglars operate best if, in fact, only burglars are punished pursuant to such laws, and so on. There would be little point in having a body of substantive criminal law if, when it came to the trial stage, the factual inquiry had so many distortions that most guilty people were acquitted and most innocent individuals were convicted.

¶1.2 The objectives of evidence law — truth, discipline, protection

To achieve an accurate result, the laws about evidence should (at least notionally) identify and pursue only those objectives which help to achieve that result. In particular, three relevant objectives can be identified:

1. truth
2. discipline (disciplinary), and
3. protection (protective).

1.2.1 Truth objective is important

The most obvious objective of the law of evidence is to ascertain the "truth". This view was propounded approximately two centuries ago. According to Bentham, the ultimate aim of the law of evidence is to ensure the rectitude (righteousness) of

1 Jeremy Bentham, "Introduction", *The Works of Jeremy Bentham, vol 2* (*Judicial Procedure, Anarchical Fallacies, works on Taxation*), (1843), editor: John Bowring.

decision making.[2] On this view, the rules of evidence should be designed to reach the true or correct outcome pursuant to the substantive law.

Theoretically, it is only possible to reach that outcome if the information which is relied upon is reliable. Hence, it is not surprising that one of the key pillars upon which the rules of evidence are based is the principle of reliability. In the criminal law domain, where the rules of evidence operate most acutely, it aims to ensure that the guilty are convicted and the innocent are acquitted. The reliability principle underpins a number of rules which are intended to enhance the accuracy of the outcome. Thus, for example, hearsay evidence is excluded as a matter of principle, but may be ruled admissible; identification evidence may be highly relevant, but it is also inherently unreliable, and so is often ruled inadmissible.

However, the law has not gone down the path of pursing truth as the only, or even the ultimate, objective of evidence law. The two other broad objectives (ie disciplinary and protective objectives) attenuate the search for the truth.

1.2.2 Disciplinary objective — arguably flawed

The "disciplinary" objective may lead to the exclusion of certain forms of "wrongly" obtained evidence. Thus, in some cases, forced admissions and illegally or improperly obtained evidence are excluded in a bid to discourage law enforcement officers from adopting inappropriate practices in the detection and investigation of crime. In theory, this also has the additional benefit that the community is seen not to condone unfair tactics employed against suspects.[3]

The strongest expression of the disciplinary objective is found in the form of a discretion to exclude improperly or illegally obtained evidence. As we shall see in Ch 14 however, this discretion is rarely exercised to exclude evidence and hence, the importance of the disciplinary objective is diminishing. However, in rare cases the principle also operates in a reverse manner, such that parties who act unfairly can be compelled to disclose evidence that would otherwise come within an exclusionary rule. This arises in the context of legal professional privilege, which is discussed further in Ch 13.

It is not clear whether the disciplinary objective should be permitted to shape evidence law. Arguably, the disciplinary aim should be abandoned because the law of evidence is an ineffective vehicle for achieving such ends. If a police officer beats up a suspect to obtain an admission, the (potential) exclusion of the admission does not constitute a sufficiently meaningful disciplinary measure to deter future misconduct.

2 Jeremy Bentham, *The Works of Jeremy Bentham, vol 5 (Rationale of Evidence, Rationale of Judicial Evidence)*), (1843), editor: John Bowring; *The Works of Jeremy Bentham, vol 7 (Rationale of Judicial Evidence Part 2)*, (1843), editor: John Bowring.

3 This principle was central to the reasoning of the House of Lords in *A (FC) and others (FC) (Appellants) v Secretary of State for the Home Department (Respondent)* (2004) *A and others (Appellants) (FC) and others v Secretary of State for the Home Department (Respondent) (Conjoined Appeals)* [2005] UKHL 71, where it held that information that may have been obtained by the use of torture is not admissible against accused being tried for terrorist offences.

The police officer suffers no tangible detriment whatsoever. He/she may be displeased that the case has been weakened, but his/her job is not to punish criminals; merely to detect crime and to investigate the case. Police are not meant to have a personal stake in the case. If they do, they are misguided.

By contrast, employing other approaches to deter such behaviour would appear far more effective. Police who resort to illegal means to obtain evidence should be charged with a criminal offence, or face internal disciplinary proceedings. Where less drastic, but, nevertheless, inappropriate means are used to obtain evidence (such as providing an inducement), the police officer should be counselled at work. Again, the law of evidence appears to be a blunt and ineffective instrument to secure this objective.

Moreover, the reception of unfairly obtained evidence does not necessarily entail an endorsement by the community of the means used to obtain the evidence. Rather, it is a reflection of the fact that we should always maximise whatever resources we have at our disposal to make the community the best it can be (eg by convicting the guilty). It is simply about making the most of a bad thing, rather than compounding the problem.

The message that it is unacceptable to use inappropriate means to obtain evidence can be communicated in a number of (more effective) ways than by excluding the evidence from court proceedings. For this reason, the disciplinary objective should be abandoned.

1.2.3 Protective objective

Another objective that shapes evidence law is the "protective" objective. This objective requires that parties to litigation are treated fairly and protected from possible prejudices. It has its strongest expression in the criminal law, given that accused persons are potentially the most vulnerable, and have the most at stake, in the justice system. Moreover, many of the criminal acts of which a person may be accused, or even may have once committed, can attract social opprobrium (eg crimes against children and the elderly and serious sex crimes). Thus, this principle finds its strongest expression in rules prohibiting the admission of prior criminal convictions of an accused, including those which are of a similar nature to the offence with which the accused is charged. Accused people are afforded the right to remain silent during official questioning, during the court process, and generally, to have no adverse comment made about that silence.

Despite the intuitive appeal of the protective principle, some empirical data suggests that decision makers are not, in fact, highly influenced by extraneous considerations (eg negative personal qualities associated with an accused). A study in New Zealand analysed the decision-making processes of 48 juries. In only 19 of the 48 trials considered in that study did individual jurors overtly raise arguments based upon some irrational sympathy or prejudice during deliberations. And, even on these occasions, such sentiments rarely played an important role in the ultimate decision:

> "[When feelings of sympathy or prejudice were raised] they were routinely overridden by the remainder of the jury who ultimately persuaded or pressured them to accept the majority approach. As a result, there were only six cases in

> which feelings of sympathy or prejudice were identified as having affected the outcome of the trial in some way: three resulted in a hung jury; one in a questionable verdict; and two in a verdict which was justifiable but arrived at by dubious reasoning.''[4]

These findings were supported by another study which showed that an ''old previous conviction was found to have little or no effect on jury decisions''. Surprisingly, magistrates were more influenced by prior convictions than jurors.

However, where the previous conviction is similar to the charged offence or the prior criminality is serious, this increases the likelihood of the conviction.[5]

In this case, the weight of the research data indicates that pre-judgments stemming from prejudicial information about an accused are readily formed and cannot be reversed, even by directions from the trial judge.

In relation to the effect of media publicity, James Ogloff and Neil Vidmar tested a pool of 121 graduates to ascertain its impact on potential jurors, and discovered that, while they were unable to determine the exact psychological mechanism involved, exposure to television and print media, in fact, biased potential jurors. The level of bias was the greatest when potential jurors were exposed to both forms of media.[6] More concerning, most potential jurors were not aware of their bias, thereby making it more difficult to eliminate.

In a further study, Geoffrey Kramer et al observed the ineffectiveness of directions in eradicating juror bias.[7] Again, the exact reason is unclear. However, it has been suggested that if jurors are unaware that they are biased, logical instructions are unlikely to overcome their emotional inclinations.[8]

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4 Warren Young, Yvette Tinsley and Neil Cameron, ''The Effectiveness and Efficiency of Jury Decision Making'' (2000) 24 *Criminal Law Journal* 89, 93. For a contrary view, see Penny Darbyshire, Andy Maughan and Angus Stewart, ''What Can the English Legal System Learn From Jury Research Published up to 2001?'', Kingston University, *Occasional Paper Series* 49, Kingston upon Thames, UK: Kingston Business School/Kingston Law School, (2002): A striking point to emerge from this research is the inability of jurors to comprehend even basic judicial directions.

5 Sally Lloyd-Bostock, ''The Effects on Juries on Hearing About the Defendant's Previous Criminal Record: A Simulation Study'' (2000) *Criminal Law Review* 734.

6 James Ogloff and Neil Vidmar, ''The Impact of Pre-trial Publicity on Jurors: A study to compare the relative effects of television and print media in a child sexual abuse case'' (1994) 18 *Law and Human Behaviour* 507.

7 Geoffrey P Kramer, Norbert L Kerr and John S Carroll ''Pre-trial publicity, judicial remedies, and jury bias'' (1990) 14 No (5) *Law and Human Behaviour* 409.

8 James Ogloff and Neil Vidmar, ''The Impact of Pre-trial Publicity on Jurors: A study to compare the relative effects of television and print media in a child sexual abuse case'' (1994) Vol 18 *Law and Human Behaviour* 507, 522. As noted above, the weight of evidence supports the contention that it is difficult if not impossible to eradicate jury bias (see Phoebe Ellsworth in Reid Hastie (ed), *Inside the Juror: The Psychology of Juror Decision Making* (1993); Nancy M Steblay, Jasmina Besirevic, Solomon M Fulero and Belia Jimenez-Lorente,''The effects of pre-trial publicity on juror verdicts: A meta-analytic review'' (1999) Vol 23(2) *Law and Human Behavior*, 219; Joel D Lieberman and Jamie Arndt. ''Understanding the Limits of limiting instructions: Social physiological explanations for the failure of instructions to disregard pre-trial publicity and other inadmissible evidence'' (2000) Vol 6(3) *Psychology, Public Policy and Law* 677. For a contrary suggestion, see Michael Chestermanal, Janet Chan and Shelley Hampton ''Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales'', *The report of a collaborative research project of the University of New South Wales and the Law and Justice Foundation's Justice Research Centre*, (2001) Justice Research Centre, Law and Justice Foundation of NSW.

On the basis of current research and knowledge in this area, the logical guiding assumption is that the level of pre-judgment and the difficulty in erasing it is directly proportional to the amount of adverse prejudicial material that is admitted against an accused.[9]

The usual charge to the jury, which directs the members to decide the case only on the basis of the evidence, ignoring all other considerations, and dismissing any feelings of sympathy or prejudice, may be of limited value and effect to correct these prejudices and biases. It appears that the human mind is such that memories cannot be selectively erased and emotional dispositions cannot be negated on command. Accordingly, the protective objective remains important and the rules of evidence that prohibit unfairly prejudicial evidence being admitted against an accused should be interpreted strictly.

1.2.4 Other objectives

In addition to the above three objectives, there are also miscellaneous ideals, policies and objectives which have shaped, and continue to shape, the rules of evidence. For example, as we shall see in Ch 3, in some cases relatives of an accused are excused from having to give evidence against the accused. The reasoning for this appears to be a recognition that loyalty is an important virtue which should be given some expression in the law and a policy of protecting the basic social unit, the family. For that same reason, the exception also extends to spouses. Further, in Ch 14 we shall see that communications between lawyers and their clients are generally not admissible. A number of reasons have been advanced for this, including the desirability of fostering trust between lawyers and clients, and the importance of giving meaningful advice to a client based on complete and honest instructions.

Thus, it is clear that the law of evidence pursues a number of objectives. There is no ranking of their respective importance, and often the objectives will conflict.

However, despite statutory reform, the corollary of that conflict is that evidence-based inquires can often be unpredictable, seemingly complex and may not ultimately lead to the truth.

¶1.3 Continued reform of evidence law

Throughout this book, the difficulties and shortcomings of evidence law are identified and discussed. This includes divergences in the approach to the law between jurisdictions.

But, it can be said at once that the future direction of evidence law reform should be guided by a clear methodology and be based on clear and identifiable premises. The merits of this approach can only be assessed after a thorough understanding of evidence law, considering both texts and cases. However, the approach is set out at this early point to provide readers with a framework to critically evaluate the current law.

9 See further, Allan Ardill, "The right to a fair trial: prejudicial pre-trial media publicity" (2000) Vol 25 *Alternative Law Journal* 1; Craig Burgess, "Can 'Dr Death' Receive a Fair Trial?" (2007) Vol 7 *Queensland University of Technology Law & Justice Journal* 16.

The suggested approach to further developing evidence law is based on the following premises:

1. The current state of evidence law is unsatisfactory — it is replete with complex, vague and often seemingly contradictory rules.
2. There is no empirical evidence (nor unchallengeable intuitive basis) to support the bulk of the rules.
3. The process of incremental change to a fundamentally flawed system will not fix existing distortions and anomalies — painting a crumbling house is a wasted task.
4. Reform, as opposed to change, can only occur if the current system is fundamentally reshaped. There is no "evidence" that the current system is based on a verifiable body of knowledge.
5. The starting point with any system is to ascertain the objective that it seeks to achieve.
6. The aim of evidence law should be to ascertain the truth.
7. If commentators wish to urge for other goals, the onus is on them to:
   (i) *prove* why these goals are desirable
   (ii) *prove* how evidence law can achieve these goals, and
   (iii) *establish* why these goals are important enough to trump the search for the truth.
8. The fundamental rule of evidence is that any information that is relevant to the inquiry at hand is admissible.[10]
9. Information should only be excluded if there is cogent evidence that it will tend to frustrate the search for the truth (eg because it belongs to a class of information which is demonstrably and inherently unreliable).
10. There is little firm evidence to suggest that any class of information will distort the search for the truth, apart from information that is demonstrably prejudicial to an accused.
11. Unless, and until such evidence is forthcoming, we logically revert to the default position — all relevant evidence is admissible.
12. This methodology and, in particular, the demand for evidence before a rule of exclusion is adopted, might seem to be setting the bar too high. This is commensurate with the importance of the institution that is evidence law. The price for getting it wrong, not only in terms of wrongful convictions, but also wrongful acquittals, is high.

A defining aspect of evidence law and court procedure is that the fundamental processes have remained constant for centuries. Scientific advances, dealing with human behaviour and psychology or the use of technology, have not penetrated the courtroom.

10 Section 190 of the *Evidence Act 1995* (Cth), in fact, allows for the waiver of most of the rules of evidence, especially in civil proceedings.

However, in the not too distant future, there is a prospect that pioneering research into human credibility testing may be adapted to the courtroom, thereby making many of the rules of evidence redundant. For example, research suggests that functional Magnetic Resonance Imaging (MRI) may provide a means to categorically distinguish between honest and dishonest witnesses. Scientific analysis shows that five areas of the brain reveal significant activation during lying compared with telling the truth: the right inferior frontal, right orbitofrontal, right middle frontal, left middle temporal and right anterior cingulated areas. Such approaches to discerning between the oral evidence given by witnesses (although not fool proof), would do more to ensure the integrity of the fact-finding process than the unscientific and intuitive rules of evidence law.[11]

Psychologists and behaviourists have long shown that there are external tell-tale signs of a person who is lying. Evidence suggests, however, that the normal signals that judges and jurors commonly associate with a positive (honest) demeanour are flawed. People are in fact bad at detecting lies. Myths about lying include that people who cannot look you in the eye are lying and that pleasant facial expressions or directness of speech are associated with the truth.[12] One recent study showed that: ''most people are lousy lie detectors, with few individuals able to spot duplicity more than 50% of the time''.[13] A study by University of California Psychology Professor, Paul Ekman, revealed that when people lie, they provide a cluster of verbal and nonverbal clues. The clues are mainly found in parts of the face and derive from the fact that musculature of the face is directly connected to the areas of the brain that process emotion. Neurological studies even suggest that genuine emotions travel different pathways through the brain than insincere ones. These clues often last no more than a quarter of a second and hence, are lost to the untrained eye.[14]

While such studies are promising signs that the legal fact-finding process can become more accurate and reliable, for now, it is necessary to have a thorough understanding of the rules of evidence. This book examines and evaluates these rules, starting with a brief review of the historical foundations of evidence law.

¶1.4 The historical foundations of evidence law

While the Act has contributed substantially to the reform of evidence law, it has largely done that by unifying and simplifying the law as it stood prior to its enactment.

It is beyond the scope of this book to examine in detail the historical development of the law of evidence, particularly in relation to the specific exclusionary rules and discretions which are now contained in the Act. However, it is useful to consider the

11 Frank Kozel, Tamara M Padgett and Mark S George, ''A Replication Study of the Neural Correlates of Deception'' (2004) Vol 118 *Behavioural Neuroscience* No 4, 852–856.

12 Peter O'Shea, ''Assessing the Credibility of Witnesses'', *Paper* (delivered at the National Judicial Orientation Programme), Brighton Le Sands, October 2001.

13 Ekman's study is discussed in James Geary, ''How to spot a liar'' (2000) Vol 155 No (10) *Time Europe*.

14 James Geary, ''How to spot a liar'' (2000) Vol 155 No (10) *Time Europe*; Jonathon Knight, ''The Truth about lying'' (2004) Vol 428 *Nature* 692. See more recently, Mark Bouton, *How to Spot Lies Like the FBI: Protect Your Money, Heart, and Sanity Using Proven Tips* (2010), Cosmic Wind Press.

broad themes and ideas which have emerged during the several centuries over which this area of the law has developed, and which now culminates in the law of evidence contained in the Act.

1.4.1 Early modes of trial

The historical foundations of Australian evidence law are not to be found in the law reports or statutes of the late 1700s, but rather, in the much older processes of dispute resolution prevalent in England from the time of William the Conqueror in 1066. Around that time, disputes were usually settled by ordeal: the evidence of guilt or innocence (for these were almost always criminal, rather than civil trials) was revealed by the "Iudicium Dei" (meaning "The Judgment of God"). There were three principal types of ordeals. These were by:

1. fire (the flesh was burned, and healing meant a person was innocent)
2. water (a person was thrown into water and if they sank they were innocent), and
3. combat (only for the noblemen, the winner being favoured by God and therefore innocent).

These ordeals were not abolished until much later (eg trial by combat remained an option in England until around 1819), but added to them, was a new approach to resolving disputes: the use of oaths as means of proving a claim. Oaths could be sworn to prove both civil and criminal charges. Maitland explains how they were used:

> "It is adjudged, for example in an action of debt that the defendant do prove his assertion that he owes nothing by his own oath and the oaths of a certain number of compurgators or oath helpers. The defendant must then solemnly swear that he owed nothing, and his oath helpers must swear that his oath is clean and unperjured. If they safely get through this ceremony, punctually repeating the right formula, there is an end of the case, the plaintiff, if he is hardy enough to go on, can only do so by bringing a new charge, a criminal charge of perjury against them. . .
>
> *Maitland, Forms of Action, 309*"

1.4.2 Reform to the modes of trial

Between 1100 and 1200 (approximately), the swearing of oaths to prove matters before the courts — whether that be the court of the King at Westminster, or a local manorial court, or an ecclesiastical court — became increasingly prevalent. Henry II extensively reformed the law, both in substance and in form, during his reign in the 1100s. Primary among the procedural changes was the expansion of the "Petty Assize" and the "Grand Assize" as a dispute resolution mechanism (*assidere*, meaning "to sit beside" from Latin). The petty assizes would be used to establish the answers to particular pre-established questions, and grand assizes were used to determine the guilt or innocence of a defendant. The assize was made up of 12 knights who were sworn to determine the dispute by "Recognition" — according to their knowledge of the facts and their conscience about the truth. From this process, the jury began to emerge.

1.4.3 Medieval juries

Originally (during the 1300s and 1400s), the persons assembled to form the assizes and courts were locals who, like witnesses, were expected to know something about the facts of the issue in dispute. The medieval jury was self-informing, and could obtain information by its own enquiries, without any formal trial. In contrast to the modern jury, juries were therefore selected from neighbours with some knowledge of the parties. Interestingly, the prevailing views about forms of proof resulted in the parties being declared incompetent as witnesses in their own cause. Thus, although there were established rules about evidence, these were, in many ways, the opposite of those which later developed.

According to Wigmore in *A General Survey of the History of the Rules of Evidence*, it is not until around the 1500s that "... the constant employment of witnesses, as the jury's chief source of information, brings about a radical change. Here enter, very directly, the possibilities of our modern system." As the process changed from jurors having personal knowledge of the facts of a case, to relying on the evidence of witnesses to come to a conclusion about a case, the possibility of judges controlling what information they were able to hear (and, thus, scope for rules about evidence) became real.

1.4.4 The advent of law reporting

In addition to the changed nature of the jury, the 1600s and 1700s brought about another important development: law reporting. At first, records of court proceedings were contained in privately prepared reports called "nominate reports" (as they took the name of the author) and the "Year Books" (the name given to the earliest law reports). However, they included little by way of rules of evidence, and the judges of the day were reluctant to follow them. Lord Mansfield in *Lowe v Joliffe* (1762) 1 Black W BL said: "We don't now sit here to take our rules of evidence from Siderfin or Keble". At the same time, an important work by Gilbert called *The Law of Evidence*, published in 1754, collected the rules of evidence and applied academic rigour to them. However, the familiar rules of evidence, such as "best evidence rule", the general prohibition on hearsay, and the admissibility of opinions in court, were in existence, if not yet fully developed.

1.4.5 The Victorian era

By the 1800s, many evidential rules had become entrenched and complicated and, in some cases, the old rules were being abolished, while new ones were being created. The law was vulnerable to the Victorian drive for progress and modernisation. One of the most obvious features of the law of evidence was the number of witnesses that it excluded from giving evidence: those who could not swear a Christian oath, those who had a criminal conviction, or those who had a pecuniary interest in the outcome of the matter, or even their spouses. Change was necessary. For example, a well-respected English lawyer and judge, Sir James Fitzgerald Stephen, re-wrote the Indian Evidence Law and published a private manuscript as a Digest on the Law of Evidence, intended to codify the common law for use by English Courts, but which ultimately proved unsuccessful. Reform of the law ultimately occurred in many areas, embodied in new statutes such as the *Evidence Act 1843* 6 & 7 Vict c 85. This abolished the common

law rule making incompetent as witnesses certain classes of people, including the accused. Thus, the law, which was inherited by the nascent Australian colonies on 7 February 1788 (the day upon which the commission of Governor Phillip to establish the colony of New South Wales was completed), was the common law of England — a mixture of case-made law and statutes, which formed the basis of the law of evidence in this country for the ensuing century. The rules of evidence were immediately relevant to the young colony. Some four days later, on 11 February 1788, the first criminal court was convened, which involved a charge of assault with a broken adze. The accused was convicted after verdict. Since that first trial, many of the changes to the law as it stood in England were imported — either by paramount force, or by voluntary adoption in the colonies.

1.4.6 Evidence law in Twentieth Century Australia

As noted above, the law of evidence was a common law construct. The law of evidence as it applied in the various Australian jurisdictions prior to the introduction of the Uniform Evidence Act (UEA) was a mixture of statute and common law, together with rules of court. The fact of federation resulted in divergences between the jurisdictions, which complicated an already complex system governing the admission of evidence in curial proceedings.

Increasingly, the impression was that the common law rules had become overly complex, devoid of an overarching rationale, and too difficult to comprehend and apply in practice. That complexity prompted the government to commence an inquiry in 1979 — undertaken by the Australian Law Reform Commission (ALRC). The ALRC was asked to review:

> ''. . . the laws of evidence applicable in proceedings in Federal Courts and the Courts of the Territories with a view to producing a wholly comprehensive law of evidence based on concepts appropriate to current conditions and anticipated requirements and to report (a) whether there should be uniformity, and if so to what extent, in the laws of evidence used in those Courts and (b) the appropriate legislative means of reforming the laws of evidence and of allowing for future change in individual jurisdictions should this be necessary.''[15]

As a result, the ALRC carefully reviewed the law of evidence as it applied in the Commonwealth jurisdiction, including the preparation of research and discussion papers. An Interim Report was published in 1985 (ALRC 26) and the Final Report in 1987 (ALRC 38).

The Final Report recommended wide-ranging changes to evidence law and included draft legislation upon which new laws could be based. This report underpinned the creation of the UEA.[16]

In 1991, the Commonwealth government, and the New South Wales government, both introduced legislation based on the ALRC draft legislation.

15 ALRC, 1985, ''Terms of Reference'', *Evidence (Interim) (ALRC Report 26)*, see www.alrc.gov.au/report-26.

16 ALRC, 1987, *Evidence (ALRC Report 38)*, see www.alrc.gov.au/report-38.

¶1.5 The Uniform Evidence Acts

1.5.1 Jurisdictions applying the Act — the Cth, ACT, NI, NSW, Tas, Vic and the NT

The Act has now been adopted in seven jurisdictions:

- the Commonwealth (in 1995)[17]
- the Australian Capital Territory (The territory initially adopted the Act as part of the Commonwealth regime in 1995, however, in 2011, it enacted its own version of the Act.)[18]
- Norfolk Island (in 2004)[19]
- New South Wales (in 1995)[20]
- Tasmania (in 2001)[21]
- Victoria (in 2010)[22], and
- the Northern Territory (in 2012)[23].

Victoria is the largest jurisdiction to recently adopt the Act. This followed a joint review of the operation of the UEA by the ALRC, the New South Wales Law Reform Commission (Report 10) and the Victorian Law Reform Commission. For the purposes of this book, this joint review will be cited as ALRC 102. This review resulted in a significant number of changes to the Act as it then applied to the Commonwealth, New South Wales and Tasmanian jurisdictions.

In addition to paving the way for the adoption of the UEA in Victoria, ALRC 102 also resulted in an increased consistency in the application of the law in each of these jurisdictions.

Evidence law in the other three Australian jurisdictions (Queensland, South Australia and Western Australia)[24] continues to be governed by the amalgam of the common law, specific evidence law statutes, and the rules of court. They have not adopted the ''model'' provisions set out in the UEA.

These specific statutes and the approach to the law of evidence (if not the rules themselves) in them are not similar to the Act. Hence, evidence law in these other jurisdictions will not be covered in this book. In the near future, it is likely that these jurisdictions will, however, adopt the UEA.

17 *Evidence Act 1995* (Cth).

18 *Evidence Act 2011* (ACT).

19 *Evidence Act 2004* (NI) (Due to its limited size, this jurisdiction is not considered further in this book.)

20 *Evidence Act 1995* (NSW).

21 *Evidence Act 2001* (Tas).

22 *Evidence Act 2008* (Vic).

23 *Evidence (National Uniform Legislation) Act 2012*.

24 *Evidence Act 1977* (Qld), *Evidence Act 1929* (SA), *Evidence Act 1906* (WA).

1.5.2 Application of the Act to proceedings

The Act applies to both jury and non-jury trials. It also applies to both criminal and civil proceedings. However, the rules sometimes differ between criminal and civil trials respectively, because of the different nature of these proceedings. The main differences in terms of the application of the rules of evidence are summarised in the ALRC 102 as follows:

> ''2.56 In regard to the admission of evidence against an accused (ie the contest of criminal trials) a more stringent approach should be taken. The differences were also reflected in areas such as: compellability of an accused, cross-examination of an accused, and in the exercise of a court's power in matters such as the granting of leave.''

While the UEA covers most areas of evidence, it does not contain all the law relating to evidence. In most jurisdictions (as a crude approximation), the UEA contains only about 80% of the rules of evidence. This considerably undermines the utility of the UEA. In order for lawyers and students to be confident that they are aware of all the relevant provisions governing a matter, it is still necessary to trawl through other legislative provisions. This is more than simply inelegant; it is inefficient, making the law overly complex and enhancing the risk of error.

This deficiency considerably undermines a key rationale underpinning the UEA, which is to simplify the law of evidence. Moreover, the areas of evidence law that are dealt with in the disparate pieces of legislation are not confined to remote and peripheral issues. They relate to often used provisions, such as the cross-examination of complainants in sex offence matters, privileges, and the tendering of alibi evidence. Some areas usually considered part of evidence law are not included in the UEA and are not affected by it (eg the legal and evidential burden of proof, the parol evidence rule, and issue estoppel).

The additional Acts that contain rules of evidence not included in the UEA are as follows:

- *Evidence (Miscellaneous) Provisions Act 1991* (ACT)
- *Criminal Procedure Act 1986* (NSW)
- *Evidence Act* (NT)
- *Evidence (Audio and Audio Visual Links) Act 1999* (Tas)
- *Evidence (Children and Special Witnesses) Act 2001* (Tas)
- *Criminal Procedure Act 2009* (Vic), and
- *Evidence (Miscellaneous) Provisions Act 1958* (Vic).

Hence, the UEA is not, and does not operate as, a complete code of the law of evidence. Section 9 of the UEA states that the Act: ''does not affect the operation of a principle or rule of common law or equity in relation to evidence in a proceeding to which this Act applies, except so far as this Act provides otherwise expressly or by necessary intendment''. Accordingly, there is scope for the application of common law principles (*R v Soma* [2003] HCA 13, [27]; *Meteyard & Ors v Love & Ors* [2005] NSWCA 444). Some judges have taken the view that the UEA is a code in relation to certain subject matters that it deals with comprehensively, such as Ch 3 (*McNeill v R*

[2008] FCAFC 80, [60]–[62]; *Idoport Pty Ltd v National Australia Bank Ltd* [2000] NSWSC 1077, [28]). However, this is not a universal view (see *Haddara v R* [2014] VSCA 100).

In any event, the code/non-code debate is largely of academic relevance only. Many parts of the UEA are unclear, and hence, require judicial interpretation and clarification.

Most fundamentally, all of the issues dealt with under the UEA were considered by the common law. The concepts, ideals, reasons and considerations that inform thinking on a particular subject matter are finite. Judges interpreting the UEA will be informed by concepts and approaches that stem from the common law. The subject matter of the UEA itself is the precipitate of the common law rules of evidence.

The continued relevance of the common law is most clearly evident from the fact that — where the UEA does not expressly adopt common law principles, such as the *res gestae* doctrine, or lies as evincing a consciousness of guilt — the courts have continued to apply such doctrines (*R v Adam* [1999] NSWCCA 189; *R v Lane* [2011] NSWCCA 157). Further, the Act does not abolish rules and inferences that can be drawn regarding the failure to call evidence and hence, the rule in *Jones v Dunkel* [1959] HCA 8; 101 CLR 298 continues to operate (*Booth v Bosworth* (2001) 114 FCR 39. For a recent statement of this principle, see *Kuhl v Zurich Financial Services Australia Ltd* [2011] HCA 11, at [63]–[64]).

ALRC 102 summarised the main differences between the common law and the UEA as follows:

> ''2.18 The Acts introduce significant reforms to the common law. For example, the 'original document' rule is abolished in favour of a more flexible approach (Pt 2.2); cross-examination of a party's own witness is permissible, with leave of the court, if the witness gives 'unfavourable' evidence (s 38); the hearsay rule is substantially modified (Pt 3.2); tendency and coincidence evidence is not admissible unless notice has been given and it has 'significant probative value', and in criminal proceedings, the probative value of such evidence adduced by the prosecution must 'substantially outweigh' any prejudicial effect it may have on the defendant (Pt 3.6); the privilege against self-incrimination is modified (s 128); a court may exercise a general discretion to refuse to admit evidence where the probative value is substantially outweighed by the danger that it is unfairly prejudicial to the defendant (s 135), or may limit the use to be made of the evidence if there is a danger that the evidence might be unfairly prejudicial to a party or be misleading or confusing (s 136); the use of computer generated evidence is facilitated (ss 146–147); and a 'request' system has been introduced as a procedural safeguard (Div 1 of Pt 4.6). Other notable reforms include abolition of the ultimate issue and common knowledge rules (s 80), an extension of privilege to religious confessions (s 127) and, in the case of the Evidence Act 1995 (NSW), an extension of a qualified privilege to protect communications made in the context of a professional confidential relationship (Div 1A of Pt 3.10).''

Thus, common law rules and equitable principles continue to be relevant to the interpretation of the Act to the extent that they are not inconsistent with it.[25]

1.5.3 Structure and interpretation of the UEA — consistency and inconsistency

This book explains the operation of the Act. There is a large degree of consistency in how the Act operates in each jurisdiction. Approximately 90% of the provisions are the same in each jurisdiction. Tasmania is the jurisdiction which is the least consistent with the other jurisdictions.

Where a section of the Act is cited in this book, the section applies in each of the jurisdictions unless stated to the contrary.

Although there is a large degree of convergence in the manner in which the Act is worded in each of the jurisdictions, on occasion, different interpretations are given by the courts in each of the jurisdictions.

Theoretically, the Act should be interpreted in the same manner in each jurisdiction. This is because the sections are usually identical. Further, a principal objective underpinning the Act is to have uniform evidence law in Australia. This approach is supported by the fact that — where Parliament re-enacts a section which has a settled meaning (by the courts) — then it is the intention of Parliament that that meaning is correct. The High Court said in *Re Alcan Australia Limited; Ex Parte Federation of Industrial Manufacturing and Engineering Employees* [1994] HCA 34, at [20] that:

> "Parliament re-enacted, in s 4(1) of the Act, words which are almost identical with those considered in *Reg v Portus*. There is abundant authority for the proposition that where the Parliament repeats words which have been judicially construed, it is taken to have intended the words to bear the meaning already 'judicially attributed to (them)'."

Further, in *Australian Securities Commission v Marlborough Gold Mines Ltd* [1993] HCA 15, at [4], the High Court said:

> "[U]niformity of decision in the interpretation of uniform national legislation such as the [Corporations] Law is a sufficiently important consideration to require that an intermediate appellate court — and all the more so a single judge — should not depart from an interpretation placed on such legislation by another Australian intermediate appellate court unless convinced that that interpretation is plainly wrong."

However, for pragmatic reasons, the Act is not always interpreted in the same manner in each of the respective jurisdictions. There are several reasons for this. The first one relates to specific interpretive legislation applying in Victoria and the Australian Capital Territory. Specifically, these two jurisdictions have a Human Rights Charter. Section 32 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) states:

25 Section 9 of the Act. See also *R v Soma* [2003] HCA 13, [27]. In relation to some topic matters the Act is so extensive that it covers the field on that topic, leaving no operation for the rules or principles of common law. One such topic relates to Ch 3 of the Act: *E I Dupont de Nemours & Company v Imperial Chemical Industries PLC* [2002] FCA 230, [46].

> "32 Interpretation
>
> (1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.
>
> (2) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision."

Section 30 of the *Human Rights Act 2004* (ACT) is to similar effect.

The Victorian courts have given considerable weight to the rights contained in the Charter in defining the law (see, for example, *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381).

In *R v Momcilovic* [2010] VSCA 50 the Court of Appeal, at [35], made the following observations regarding the manner in which the Victorian Charter is to operate:

> "[W]hen it is contended that a statutory provision infringes a Charter right, the correct methodology is as follows:
>
> Step 1: Ascertain the meaning of the relevant provision by applying s 32(1) of the Charter in conjunction with common law principles of statutory interpretation and the *Interpretation of Legislation Act 1984* (Vic).
>
> Step 2: Consider whether, so interpreted, the relevant provision breaches a human right protected by the Charter.
>
> Step 3: If so, apply s 7(2) of the Charter to determine whether the limit imposed on the right is justified."

Thus, the Act in Victoria and the Australian Capital Territory will be interpreted through the lens of the rights enshrined in the charters.

A second reason stems from the way in which the courts approach their interpretive task. Courts in the respective jurisdictions do not reflexively follow decisions in other jurisdictions. Thus, a local jurisprudence will, to some extent, emerge in each of the jurisdictions in which the Act operates. A recent example of this occurring is the decision in *P N J v DPP* [2010] VSCA 88, where the Victorian Court of Appeal expressly rejected the test applied in New South Wales regarding the admissibility of coincidence evidence (which is governed by s 38 of the Act). In doing so the court stated:

> "15 A question arose, at the commencement of argument on; the application for leave to appeal, as to the nature of the appeal from a ruling of this kind. . . . the New South Wales Court of Criminal Appeal has (by majority) held that a decision of this kind is reviewable on appeal only on the principles stated in *House v The King*.[19] That view was expressed by Simpson J (with whom McClellan CJ at CL agreed) in *R v Fletcher*, [20] and her Honour adopted the same approach (with the concurrence of Buddin J) in *R v Zhang*. [21] In the latter case, however, Basten JA in dissent expressed the view that the appeal court should decide for itself whether the relevant evidence was admissible. [22]
>
> 16 On this application, senior counsel for the Crown accepted that the Court should, if leave to appeal were granted, decide for itself whether the coincidence

> evidence was admissible. Unsurprisingly, counsel for the applicant concurred. We have approached the matter on that basis. With respect to those members of the New South Wales Court of Criminal Appeal who have taken a different view, we think that the analysis of Basten JA in Zhang, [23] together with that of Underwood CJ in *L v Tasmania*, [24] accords with the approach which this Court has consistently taken in dealing on appeal with questions of admissibility of evidence.''

The illuminating aspect of this passage is the limited weight given to the New South Wales courts' interpretation of the provision by the Victorian Supreme Court of Appeal. In more recent years, the courts in the UEA jurisdictions have increasingly given the interpretation of the Act a meaning that is expressly contrary to that given in other jurisdictions. Important examples relate to the application of the jurisdiction to exclude prejudicial evidence (s 137) and the admissibility of tendency and coincidence evidence (s 97 and 98). These regional differences are discussed in later chapters of this book.

Throughout this book, other examples of divergent views taken by the courts in respective jurisdictions regarding the interpretation of the Act will be provided. While judgments in one jurisdiction will generally be accorded significant weight in other jurisdictions (where they consider the same parts of the Act), it is unsound to assume that they will always be followed. Thus, the law as it has been considered and applied in a specific jurisdiction must always be identified.

¶1.6 The approach to resolving evidential issues under the Act

There is a logical structure for resolving evidential issues created by the Act. This structure is important in terms of providing a framework for dealing with all evidence-based matters, and for understanding the significance of the discrete issues which touch upon the admissibility of a piece of evidence. Broadly, the structure is as follows:

1. Is the witness competent? If not, the evidence is not admissible. If the answer is yes, proceed to point 2.
2. Is the evidence relevant? If not, the evidence is not admissible. If the answer is yes, proceed to point 3.
3. Is the evidence excluded by the application of an exclusionary rule (eg the rules against hearsay, opinion, similar fact evidence and credibility evidence) or the application of a privilege (eg client-legal, self-incrimination, matters of state, settlement negotiations or religious confessions privilege)? If the answer is yes, the evidence is not admissible. If the answer is no, proceed to point 4.
4. Is the evidence excluded by the operation of a discretion in s 135, 137 or 138? If the answer is yes, the evidence is not admissible. If the answer is no, the evidence is admissible.

Thus, evidence is only admissible if it passes each of the four threshold tests above. If it fails any one threshold, it is inadmissible. In that event, it is not necessary to consider any further threshold test. Often though, evidence will fail to pass more than one threshold.