

# **EVIDENCE LAW SUMMARY 2010**



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## The nature of evidence and preliminary issues

The laws of evidence consist of the rules and principles applied by courts in the process of fact-finding at a trial. The ‘facts in issue’ are those that the plaintiff or prosecutor and the defendant or accused must prove in order to be successful.<sup>1</sup>

To determine what the ‘facts in issue’ are, first look at:

1. the substantive rules of law;
2. the pleading (in civil cases) or the charge and plea (in criminal cases); and then
3. the manner in which the case is conducted.

### Source of evidence law and application

Evidence is determined by both the common law and the various Evidence statutes in existence.<sup>2</sup> Every State and Territory is now a ‘uniform evidence legislation’ jurisdiction and is governed by evidence legislation that reflects the *Evidence Act 1995* (Commonwealth). We use the *Evidence Act 1995* (Commonwealth) [herein referred to as “Evidence Act”] as the model for our summary. Note that the Evidence Act applies only to matters within federal jurisdiction.<sup>3</sup>

### Criminal versus civil proceedings

Note that certain provisions of the Evidence Act will only apply to criminal proceedings. For the purposes of the Evidence Act, a criminal proceeding is a prosecution for an offence – including bail hearings, committal hearings, and sentencing. A civil proceeding is anything other than a criminal proceeding.

Criminal provisions only:

- Section 17 – competence and compellability of defendants in criminal proceedings;
- Sections 18 and 19 - competence and compellability of spouses in criminal proceedings;
- Section 20 – comment on failure of criminal defendant to give evidence;
- Section 33 – evidence given by police officers in criminal proceedings;
- Sections 65 and 66 – first-hand hearsay in criminal proceedings;
- Section 85 – reliability of admission by criminal defendants;

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<sup>1</sup> P Waight and B Williams *Evidence Commentary and Materials* Sixth Edition. Lawbook Co. Casebook. 2002 Pyrmont NSW.

<sup>2</sup> *Evidence Act 1971* (ACT); *Evidence Act 1995* (NSW); *Evidence Act 1939* (NT); *Evidence Act 1997* (Qld); *Evidence Act 1929* (SA); *Evidence Act 2001* (Tas); *Evidence Act 2008* (Vic); *Evidence Act 1906* (WA).

<sup>3</sup> However, note that section 4 of the *Evidence Act 1995* (Cth) states that the Act applies to all Federal Courts and tribunals as well as courts of the Australian Capital Territory. Section 8 provides that the Act does not affect the operation of any legislation or regulation in force in the ACT, including the *Evidence Act 1971* (ACT).

- Sections 86, and 89 – 90 – information obtained in the course of official questioning;
- Section 101 – further restrictions on tendency and coincidence evidence tendered by prosecution;
- Section 104 – cross-examination of the accused;
- Section 105 – the accused making unsworn statements;
- Parts 3.8 and 3.9 – character and identification;
- Section 137 – judicial discretion to exclude prejudicial evidence;
- Section 141 – criminal standard of proof; and
- Section 184 – admitting facts by accused.

### General structure of the Evidence Act

The general structure of the Evidence Act is as follows:

- **Adducing evidence:** providing information and statements in a court to prove or disprove a fact in issue. The types of evidence that can be put before a court are: oral testimony of a witness; documentary evidence; and real evidence. Only evidence relevant to a proceeding and complying with the other rules of evidence is admissible in a proceeding.<sup>4</sup>
  - Part 2.1: Witnesses;
  - Part 2.2: Documentary evidence;
  - Part 2.3: Real evidence
- **Admissibility of evidence:** conditions for admissibility of the evidence and the restrictions on what evidence can be considered.
  - Part 3.1: Relevance;
  - Part 3.2: Hearsay rules;
  - Part 3.3: Opinion rules;
  - Part 3.6: Tendency and Coincidence rules;
  - Part 3.7: Credibility rules;
  - Part 3.10 Privileges;
  - Part 3.11: Discretions to Exclude.

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<sup>4</sup> P Nygh and P Butt (general editors) *Butterworths Concise Australian Legal Dictionary*. Second edition. 1998.

- **Proof:** includes the notion of standard of proof – an objective measure for determining whether or not a fact or issue has been proved.<sup>5</sup>
  - Part 4.1: Standard of proof;
  - Part 4.2: Judicial notice;
  - Part 4.3: Facilitation of proof.

## ***Facts which can be proved without evidence***

### **Waiver of rules of evidence**

**Section 190** of the Evidence Act gives the court power to order, and in some cases, the parties to waive, the requirements of certain parts of the Evidence Act. This may be done in both civil and criminal proceedings.

The following requirements of the Evidence Act may be waived under section 190:

- Part 2.1 – divisions 3, 4 or 5;
- Part 2.2 or 2.3 (documents and other evidence); or
- Parts 3.2 to 3.8 – hearsay, opinion, admissions, evidence of judgments and convictions, tendency and coincidence, credibility and character.

### **Agreed facts and admissions**

**Section 191** of the Evidence Act allows parties to agree as to the facts so that evidence is not required to prove the existence of the agreed fact.

**Section 184** of the Evidence Act proves for agreement of facts in criminal proceedings.

Admissions are any previous representation made by a party that is adverse to that party's interest in the outcome of the case. Formal admissions of fact can be made in the both civil and criminal proceedings. The admissibility of admissions into evidence is subject to a number of exceptions; these are discussed in more detail later.

### ***Preliminary questions***

Preliminary questions include questions of admissibility, or whether some condition is satisfied so that evidence is admissible (eg whether an expert is sufficiently qualified to be an expert witness).

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<sup>5</sup> P Nygh and P Butt (general editors) *Butterworths Concise Australian Legal Dictionary*. Second edition. 1998.

These preliminary questions are to be heard in the absence of the jury as per section 189 of the Act. This is called a *voir dire* (a trial within a trial).

The relevant section to determine preliminary questions is 142. The standard for determining these questions is the balance of probabilities. Note also that section 142(2) requires that the court take into account:

- The importance of evidence in the proceeding; and
- The gravity of the matters alleged in relation to the question.



**If you have any queries regarding ordering the evidence law  
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