

# **EVIDENCE LAW SUMMARY**



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Sample

## Topic 1: 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 ultimately 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>

For the Evidence Act to apply the proceeding must be in a federal court (that is, the High Court, Federal Court, Family Court or the Federal Magistrates Court).

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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). Note also that section 5 provides a table of certain sections that have extended application to all proceedings in an Australian court.

In the ACT, Northern Territory, New South Wales, Tasmanian and Victorian the Evidence Acts generally mirror the Commonwealth Evidence Act and its admissibility requirements.

In other jurisdictions, the laws of evidence may vary. See the separate Acts in Queensland (Evidence Act 1977 (Qld)), South Australia (Evidence Act 1929 (SA)) and Western Australia (Evidence Act 1906 (WA)) for the comparable provisions contained herein.

### **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;
- 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;
- 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 materials 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.
  - Part 2.1: Witnesses;
  - Part 2.2: Documents;
  - Part 2.3: Other evidence
  
- **Admissibility of evidence:** conditions for admissibility of the evidence and the restrictions on what evidence can be considered. Only evidence relevant to a proceeding and complying with the other rules of evidence is admissible in a proceeding.<sup>4</sup> Relevance is the most important aspect and starting point of the law of evidence, as if evidence is considered irrelevant it will be inadmissible without the need to consider the other rules.
  - 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 3.8: Character rules;
  - Part 3.9: Identification evidence 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.