

Overview of the Evidence Act

RW White*

A. Introduction

1 Oliver Wendell Holmes, Jr. said this of the common law:

*"The life of the law has not been logic: it has been experience."*¹

*"It is the merit of the common law that it decides the case first and determines the principle afterwards."*²

2 This is especially true of the law of evidence.

3 The law of evidence in the modern sense was absent until the thirteenth century.³ Until then, trials were conducted by the primitive practices of trial by ordeal, by battle and by compurgation of oath, and proof was by "*judicium dei*" – the judgment of God. The law of evidence then slowly took shape over the centuries that followed to form the modern body of law as we know it. The common law body of evidence owes its origin and evolution to the use of the jury in trials.⁴ Although initially it was practice to empanel jurors who were taken to be already informed of the facts, this shifted to the jury being informed of the facts by witnesses. The gradual constant use of witness testimony as the jury's chief source of information raised questions of admissibility. The jury could not be trusted to

* A judge of the Supreme Court of New South Wales, Equity Division. Thanks are due to my tipstaff, Ms Michelle Wibisono, for her research and contribution to the preparation of the paper.

¹ Oliver Wendell Holmes, Jr., *The Common Law* (1882) Macmillan & Co at 1

² Oliver Wendell Holmes, Jr., "Codes, and the Arrangement of the Law" (1870) reprinted in Novick (ed) *The Collected Works of Justice Holmes* (1995) vol 1 at 212-213

³ For a discussion regarding the history of the law of evidence, see for example JH Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 3rd ed (1940) Little, Brown and Company (**Wigmore on Evidence**), especially at §8; JB Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898) Little, Brown and Company (**Thayer's Treatise on Evidence**)

⁴ See e.g. *Thayer's Treatise on Evidence* at 2-3

distinguish between reliable and unreliable evidence, so rules had to be developed to regulate how evidence was admitted.

- 4 The law of evidence developed slowly because for a long while, there was simply a mass of evidentiary rulings by judges, which had slowly accumulated since the early days of *nisi prius* and which initially were not preserved in print but in the practice and tradition of the trial courts. These rulings comprised a series of *ad hoc*, isolated responses developed by judges to different problems, at different times, and in different contexts. Thus, by the eighteenth and nineteenth centuries, the law of evidence had become highly fragmented and imbued with numerous doctrines, exceptions and technicalities. It had unfortunately taken on a general aspect that was vague, confused and unintelligible. The “best evidence” doctrine had been firmly established by the eighteenth century and dominated the law for nearly a century, but it preserved a general consciousness that the law of evidence was simple and had a narrow compass, and in doing so, masked its complexities.⁵ It was said that:

*“Until the late eighteenth century, evidence doctrine consisted almost entirely of a disconnected pot-pourri of scattered precedents. Commentators and practising lawyers perceived the law of evidence as little more than a single principle, ‘the best evidence rule’. Thus Buller’s Nisi Prius restated the law of evidence first in nine and later in twelve propositions. At the trial of Warren Hastings in 1794, Edmund Burke is reported to have said that he knew a parrot who could learn the rules of evidence in a half-hour and repeat them in five minutes.”*⁶

- 5 However, by this time, the courts had started to revise, reason upon and draw principle out of the mass of “precedents” that had been generated. This task was assisted by two developments in the latter half of the

⁵ As observed by Wigmore (see *Wigmore on Evidence* at 237).

eighteenth century. First, the expansion of law reporting, especially *nisi prius* cases, aided in preserving the rulings and provided a source of reference for the judiciary and legal profession alike. Secondly, the first specialised works on evidence by eminent writers, among whom stood Bentham, Wigmore and Thayer, also appeared.⁷ Although the writers held different concerns as to the inadequacies of the law of evidence, they were united in their goal to try to make the law of evidence more visible, to try to rationalise and systemise the law, and to advocate reforms of doctrines of evidence.⁸ Wigmore, for instance, was driven by the belief that the rules of evidence were essentially rational – there was always a reason for the rules, even though it may not be a good one in point of policy.⁹

6 These writers were motivated by the difficulties that pervaded litigation at the time. The prohibitive expense, interminable delays and obfuscating technicalities that generally characterised litigation¹⁰ were only exacerbated by the stigma of technical arbitrariness and obstructive reasoning attached to the law of evidence.¹¹ In writing, “*Evidence is justice*,”¹² Bentham identified that rules of evidence occupy a central part of our judicial system, existing to exclude considerations that can have no rational bearing, or which substitute prejudice for reason. Inefficient rules of evidence impair access to justice and “justice” itself. Chief Justice

⁶ W Twining, *Theories of Evidence: Bentham and Wigmore* (1985) Weidenfeld & Nicolson (*Theories of Evidence*) at 1; see also *Wigmore on Evidence* at 237 (footnote 5).

⁷ Seminal works included: J Bentham, *A Treatise on Judicial Evidence* (extracted from the manuscripts of Jeremy Bentham by M Dumont) (London, 1825) and J Bentham, *Rationale of Judicial Evidence Specifically Applied to English Practice* (1827) Hunt & Clarke (***Rationale of Judicial Evidence***); *Wigmore on Evidence* and JH Wigmore, *The Principles of Judicial Proof as given by Logic, Psychology and General Experience and Illustrated in Judicial Trials* (1913) Little, Brown and Company (***Principles of Judicial Proof***); *Thayer’s Treatise on Evidence*

⁸ See generally *Theories of Evidence*

⁹ See *Wigmore on Evidence* at xiv

¹⁰ Accurately captured by Charles Dickens in *Bleak House* (1853)

¹¹ See *Wigmore on Evidence* at xiii-xiv, also observing a gentleman of great legal attainments saying to Sir James Stephen, “*My Evidence Bill would be a very short one; it would consist of one rule, to this effect: ‘All rules of evidence are hereby abolished.’*”

Spigelman has observed that a fair trial could not exist without efficient rules to regulate the procedure for search for truth.¹³ This is fundamental to our adversarial system of law, which recognises that before the court accepts a fact as “true”, it must be proved, and evidence is the foundation of proof. This must be kept in the forefront of any lawyer’s mind. Wigmore encapsulates this sentiment:

“The study of the principles of Evidence, for a lawyer, falls into two distinct parts. One is Proof in the general sense, - the part concerned with the ratiocinative process of contentious persuasion, - mind to mind, counsel to Judge or juror, each partisan seeking to move the mind of the tribunal. The other part is Admissibility, - the procedural rules devised by the law, based on litigious experience and tradition, to guard the tribunal (particularly the jury) against erroneous persuasion. Hitherto, the latter has loomed largest in our formal studies, - has, in fact, monopolised them; while the former, virtually ignored, has been left to the changes of later acquisition, casual and empiric, in the course of practice.

Here we have been wrong... Proof represents the objective in every judicial investigation... [T]his process of Proof is after all the most important in the trial. The trial culminates in either Proof or non-Proof...”¹⁴

- 7 Against the backdrop of these developments and attempts to rationalise the law of evidence, principles of evidence continued to be developed and refined by the common law over time to form a more cohesive, mature body of law. There were also numerous attempts at piecemeal legislative

¹² As noted in *Theories on Evidence* at 117. Twining also notes that Wigmore used this as a keynote quotation for his students’ textbook.

¹³ The Honourable JJ Spigelman AC, “The Truth Can Cost Too Much: The Principle of a Fair Trial - The Fourth Gerard Brennan Lecture,” speech given at Bond University, Queensland (2003) accessible at <
http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_251003>

¹⁴ See *Principles of Judicial Proof* at 3-5

interventions and reform from the middle of the nineteenth century until the present day.¹⁵

8 In Australia, that process culminated in the *Evidence Act*, which is presently a key source of our rules of evidence. It codifies and amends many rules of evidence that were previously the domain of the common law. The passage of the Commonwealth *Evidence Act* in 1995 (followed within months by the New South Wales Act)¹⁶ came more than 15 years after the Australian Law Reform Commission (ALRC) was asked to review the rules of evidence in federal courts and courts of the Territories with a view to producing a wholly comprehensive law of evidence. The ALRC's Interim Report concluded that:

*"The Commission is of the view that the law of evidence is badly in need of reform. The present law is the product of unsystematic statutory and judicial development. It is a highly complex body of law which is arcane even to most legal practitioners. It contains traps and pitfalls which are likely to leave the unrepresented litigant baffled, frustrated and defeated. The law of evidence differs widely from State to State. The differences from jurisdiction to jurisdiction derive not only from differences in Evidence Acts but also from differences in the common law applied by the courts of the various States. There are also many areas of uncertainty in the law of evidence - areas on which definitive law is yet to be pronounced by the courts. The need for reform is also demonstrated by what happens in practice - the complexities are ignored; oversimplified versions of the law are applied and judges try to discourage use of its technicalities."*¹⁷

9 Those in agreement with the ALRC hailed the *Evidence Act* as overcoming these problems, and so celebrated the Act as one of the most important reforms in the administration of justice in Australia. But this view was not uniformly shared. Many in the legal profession objected to reform and legislative intervention, fearing that a new set of laws would only abolish

¹⁵ Although many of these are not well documented: see *Theories of Evidence* at 1. See also Wigmore on *Evidence* at xvii, where Wigmore complains about the confusing mass of statutes dealing with the law of evidence, and estimated that in the first edition of *Wigmore on Evidence*, "in mere numbers, the citations of statutes in the following pages are nearly one-fourth as many as the rulings."

¹⁶ In 2001, Tasmania enacted uniform evidence legislation (*Evidence Act 2001 (Tas)*), Norfolk Island in 2004 (*Evidence Act 2004*), and Victoria in 2008 (*Evidence Act 2008 (Vic)*), which came into force on 1 January 2010).

many familiar, well-established rules and principles and introduce uncertainty where previously none existed.¹⁸

10 It is too late in the day to debate whether we should have a comprehensive *Evidence Act* that largely operates as a code. The fact that we now have a statute containing rules of evidence does not eliminate all difficulties. First, the Act is not a “code” in the sense that it contains a complete and exhaustive statement of the law of evidence.¹⁹ It does not affect the operation of other legislation (s 8). The Act is expressed not to affect the operation of a principle or rule of common law or equity except in so far as it provides otherwise expressly or by necessary intendment (s 9). Thus an important question is to what extent it is necessary or appropriate to have recourse to pre-*Evidence Act* cases.²⁰

11 Secondly, the enactment of any legislation inevitably incurs cost and often introduces uncertainty. As predicted by those objecting to the reforms, the enactment of the Act did abolish or alter well-established and well-known rules of evidence with which the legal profession and judiciary had considerable familiarity. After initially being ignored,²¹ the Act provided a fertile field for disputes about its interpretation, the resolution of which took up an enormous amount of time in court and outside it. It resulted in

¹⁷ See summary to Australian Law Reform Commission, *Evidence*, Report No 26 (Interim) (1985), accessible at <<http://www.austlii.edu.au/au/other/alrc/publications/reports/26/>>

¹⁸ The ALRC noted these objections. See ALRC Interim Report No. 26 referred to above, Vol I, paragraph 233 and following accessible at <http://www.austlii.edu.au/au/other/alrc/publications/reports/26/Ch_05.html>.

¹⁹ Thus, for instance, the *Duties Act* 1997 (NSW), s 304 operates to impose as a pre-condition to admissibility that the instrument be duly stamped.

²⁰ See e.g. *Idoport Pty Ltd v National Australia Bank Ltd* [2000] NSWSC 1077; (2000) 50 NSWLR 640 at [25]-[30]. Stephen Odgers, in his 9th edition of *Uniform Evidence Law*, 9th ed (2010) LawBook Co, expresses the view that the Act covers the field in respect of areas of competence and compellability of witnesses and admissibility of evidence, such that any common law rules are abrogated (at [1.1.1100]). However, this is inconsistent with what the High Court said in *Lee v The Queen* (1998) 195 CLR 593 at [37]. It is also inconsistent with the observations of Handley JA (with whom Beazley and Hodgson JJA agreed) in *Butcher v Lachlan Edler Realty; Harkins v Butcher* [2002] NSWCA 237 at [15], which Odgers criticises at [1.1.1100].

a substantial number of re-trials.²² Further, its interpretation (both on and off the bench) has raised issues as to how the Act should operate. Certain judicial interpretation has resulted in calls for law reform and legislative responses from Parliament (for instance, the recent amendments to the *Evidence Act* discussed below).

12 It is not without some incredulity that one contrasts this with the ‘nil’ financial impact attributed to Act when it went to the New South Wales Cabinet.²³ In a similar vein, recent amendments to the *Evidence Act* by *Evidence Amendment Bill 2008* (Cth) are said to have “no significant financial impact.”²⁴ Perhaps that statement, too, is unrealistically optimistic.

13 I have been asked to present an overview of the *Evidence Act*. Although I will not undertake the ambitious task of examining every aspect of the Act, I will provide a broad overview of the Act and the main rules for admissibility of evidence, mentioning where possible key amendments to provisions of the Act which took effect last year.²⁵ I then address certain

²¹ Not much attention was paid to the *Evidence Act* until the first High Court decisions on the Act, which were handed down 3 years later in *Lee v The Queen* (1998) 195 CLR 593 and *Graham v The Queen* (1998) 195 CLR 606.

²² As observed by Chief Justice Spigelman. See the Honourable JJ Spigelman AC, “Access to justice and access to lawyers” (2007) 14 *Australian Journal of Administrative Law* 158 (*Spigelman Access to Justice*) at 164

²³ As noted in *Spigelman Access to Justice* at 164

²⁴ See Explanatory Memorandum to *Evidence Amendment Bill 2008* (Cth) accessible at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;orderBy=customrank;page=0;query=Dataset_Phrase%3A%20Title%3A%22evidence%20amendment%20bill%22;rec=1;resCount=Default>

²⁵ Major amendments were made to the *Evidence Act* by the *Evidence Amendment Act 2007* (NSW) and *Evidence Amendment Act 2008* (Cth), which both commenced on 1 January 2009. These amending Acts implement the Model Uniform Evidence Bill, which is based on the recommendations by the Australian, Victorian and New South Wales Law Reform Commissions in their 2005 Uniform Evidence Law Report: Australian Law Reform Commission, *Uniform Evidence Law*, Report No. 102 (2005); Victorian Law Reform Commission, *Uniform Evidence Law: Report* (2005); New South Wales Law Reform Commission, *Uniform Evidence Law*, Report No 112 (2005). For a discussion of those amendments, see also NSW Attorney-General’s Department, “Fine-Tuning the Rules of Evidence”, (2009) 47(3) *Law Society Journal* 55; The Honourable Justice R Howie, “Making sense of the Evidence Amendment Act 2007”, (2010) 22(5) *Judicial Officers’ Bulletin* 37 (*Howie Evidence Amendments*)

aspects of the *Evidence Act* which illustrate the relationships between some of the key rules on admissibility. Those aspects are:

- a Issues in respect of the admissibility of evidence that is both fact and opinion in light of the hearsay rule, business records exception and opinion rule (section C);
- b The requirement for expert witnesses to comply with the Expert Witness Code of Conduct (section D);
- c The scope of the protection afforded by s 128 of the *Evidence Act* for a witness claiming privilege against self-incrimination (section E); and
- d Issues in respect of affidavit evidence, including implications of adducing identical affidavit evidence from different witnesses (section F).

14 I offer no better reason for selecting these particular issues for comment than that they are issues I have encountered from time to time as a judge in the Equity Division and a barrister practising mostly in commercial law.

15 Unless otherwise stated, extracts of and references to the *Evidence Act* in this paper are to the New South Wales legislation.

B. General overview of the *Evidence Act*

16 The structure of the *Evidence Act* is broadly intended to follow the order in which evidentiary issues ordinarily arise in a typical trial, from when evidence is adduced from witness or documents, to the end of the trial when the court determines the factual questions on the evidence that has been admitted into court (although, more often than not, the course of the trial often departs from that contemplated order).

17 The Act consists of five chapters. Chapter 1 deals with preliminary and formal matters, such as how the Act applies and its effect on other laws. Chapter 2 concerns how evidence is adduced from witnesses (namely, competence and compellability of witnesses, how sworn evidence is given, and how witnesses are questioned), documents (such as how parties prove the contents of documents by tender or other methods) and other forms of evidence (such as taking evidence on a view). Recent amendments were made to the provisions in Chapter 2 on adducing evidence from witnesses, including:

- To require the court to disallow questions that are put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate, or has no basis other than a stereotype (such as the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability), in addition to disallowing misleading, unduly annoying, harassing, intimidating, offensive, oppressive or repetitive questions (s 41).²⁶ Previously it was within the court's discretion to disallow the latter, but now the court is under a duty to disallow any of these questions even without objection. Failure to disallow does not affect the admissibility of responses to the questions (s 41(6));
- To reform the tests for determining a witness's competence to give evidence. Section 13(1) prescribes a new basic test of competence to give any kind of evidence (sworn or unsworn). Previously, a witness's competence to give evidence on a fact depended on the ability to give a rational response, but now that competence depends on a witness's ability to understand questions and give intelligible responses, including where any incapacity (whether mental, intellectual or physical) is overcome. The amendments also introduced a lower

²⁶ The amended provision adopts, with some modification, the now repealed s 275A of the *Criminal Procedure Act 1986* (NSW) and applies it to both civil and criminal proceedings. Section 41 is not the only source of law for improper questioning of witness. See for example Heydon J's

threshold for a witness's competence to give unsworn evidence. Where previously the court had to be satisfied of the witness's conceptual understanding of the difference between a truth and a lie, the court now simply has to tell witnesses that it is important to tell the truth, that they should tell the court if they do not know or remember the answers to questions, and that they should not feel pressured into agreeing with statements that they believe are untrue (s 13(5));

- To allow the court on its own motion to direct narrative evidence from a witness (previously only allowed on the party's application) (s 29(2)).

18 Chapter 4 deals with proving matters in proceedings. It covers matters such as the standard of proof in civil and criminal trials, proving matters to which judicial notice may be taken or matters of common knowledge, presumptions of proof in respect of sealed and signed documents, government and public documents, and documents posted and communicated electronically, corroboration of evidence, warnings to juries, and ancillary matters such as requests to produce documents or call witnesses, and proving foreign law, convictions or acquittals.

19 Chapter 5 concerns miscellaneous matters, such as the voir dire, waiver of rules of evidence and adducing evidence as to agreed facts. The recent amendments introduced s 192A, which allows the court to make advance rulings "*if it considers appropriate to do so*" on the admissibility or use of evidence proposed to be adduced, the operation of the *Evidence Act* or other laws in relation to the evidence, and the grant of leave, permission or direction sought under the *Evidence Act*.²⁷ Section 192A may be relied upon at any time before evidence is adduced in the trial. Parties may look

judgment in *Libke v The Queen* (2007) [2007] HCA 30; 230 CLR 559 (at [117]-[135]), which discusses the powers and duties of a cross-examiner.

²⁷ This was introduced in response to the High Court's decision in *TKWJ v R* [2002] HCA 46; (2002) 212 CLR 124, where the majority of the High Court held that the *Evidence Act* did not confer power to give an advance ruling on the exercise of discretion under ss 135 or 137 (at [39]-[45] per Gaudron J and [114] per Hayne J, Gummow J agreeing with Gaudron and Hayne JJ).

to this provision to obtain certainty that certain evidence is admissible or able to be used in a particular way, or that they will have leave to adduce certain evidence. Section 192A would allow a party to seek an advance ruling that the court will exclude certain evidence under ss 135, 137 or 138, but it may be difficult in certain circumstances to utilise the provision to convince a judge to rule on the exclusion of evidence of the opposing party before the judge has had the opportunity to form a view on the issues likely to arise in the trial.

20 Chapter 3, the heart of the *Evidence Act*, contains the rules as to the admissibility of evidence.²⁸ There is a sequential series of bars to admissibility, and the evidence must pass through all of those bars in order to be admitted. In other words, even if the evidence passes one bar (e.g. because of an exception), it does not mean that it will be admitted; if the evidence fails to overcome another bar to admissibility, it will be excluded. However, once evidence is admitted, it can be used for all relevant (and admissible) purposes, unless the court makes a ruling under s 136 to limit its use.²⁹

21 The starting point is to ask whether the evidence is relevant, that is, whether, if it were accepted, it could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding (s 55). Only relevant evidence is admissible (though it must still pass the other bars to admissibility: s 56), and irrelevant evidence is not admissible. In *Smith v The Queen* (2001) 206 CLR 650; [2001] HCA 50, the plurality of the High Court said (at [6]):

²⁸ This chapter also contains a flowchart setting out how the chapter applies to particular evidence, although it does not refer to the procedural provisions in the Act that may prevent the evidence from being adduced in the first place.

²⁹ See *Johnstone v New South Wales* [2010] NSWCA 70 at [100]-[104]; *Adam v R* [2001] HCA 57; (2001) 207 CLR 96 at [34]-[37]; *R v Horton* (1998) 45 NSWLR 426 at 432.

“As is always the case with any issue about the reception of evidence..., the first question is whether the evidence is relevant. ...[T]hat question must always be asked and answered. Further, although questions of relevance may raise nice questions of judgment, no discretion falls to be exercised. Evidence is relevant or it is not. If the evidence is not relevant, no further question arises about its admissibility. Irrelevant evidence may not be received. Only if the evidence is relevant do questions about its admissibility arise. These propositions are fundamental to the law of evidence and well settled. They reflect two axioms propounded by Thayer and adopted by Wigmore³⁰:

*‘None but facts having rational probative value are admissible,
and*

*‘All facts having rational probative value are admissible, unless
some specific rule forbids.’”*

- 22 In his Honour’s forward to the eighth edition of Odgers’ *Uniform Evidence Law*, Justice Tim Smith of the Supreme Court of Victoria (formerly the Commissioner in charge of the ALRC report) criticised the reasoning of the majority of the High Court in *Smith v The Queen* for introducing the concept of probative value to the test of relevance as s 55 requires only a logical connection between the evidence in question and the issue³¹ (although the majority’s reasoning at [11] was based on a lack of logical connection).
- 23 Evidence that is relevant must pass the following further bars to admissibility in respect of:
- a Hearsay evidence (Part 3.2);
 - b Opinion evidence (Part 3.3);

³⁰ Citing Thayer, “Presumptions and the Law of Evidence” (1889) 3 *Harvard Law Review* 141 at 144-145; *Wigmore on Evidence* (Tillers rev) (1983), vol 1, §§9, 10.

³¹ S Odgers, *Uniform Evidence Law*, 8th ed (2009) LawBook Co, at viii.

- c Evidence of a decision or finding of fact in another proceeding (Part 3.5);
- d Tendency or coincidence evidence (Part 3.6);
- e Credibility evidence (Part 3.7);
- f Character evidence (Part 3.8);
- g Identification evidence (Part 3.9); and
- h Privileged evidence (Part 3.10).

24 **Hearsay evidence:** The hearsay rule is probably the most important (and often-raised) bar to admissibility. The rule is concerned with reliability of evidence. One very important reason why the common law set its face against hearsay evidence was because the party against whom the evidence was led could not otherwise cross-examine the maker of the statement, which is of central significance in our common law adversarial system of trial.³² The rule also seeks to address the fallibility of human nature and human memory, which may affect the accuracy of a narrative that passes through several persons.

25 The Act significantly modifies the common law rule as to hearsay. Unlike the common law, the Act's hearsay rule applies solely to proof of intentionally asserted facts. The hearsay rule contained in s 59 of the *Evidence Act* precludes the admission of evidence of a previous representation made by a person to prove the existence of a fact that "*it can reasonably be supposed that the person intended to assert by the representation*" (the "asserted fact"). An example of hearsay evidence is where the words "*Made in Australia*" inscribed onto an item are adduced to prove that the item was made in Australia, or a statement made by X to the police that "Y tried to rape me" adduced to prove that Y tried to rape X.

³² As noted by the High Court in *Lee v The Queen* [1998] HCA 60; (1998) 195 CLR 594 at [32]

- 26 There are exceptions to the rule, which are in essence based on the principle that the “best evidence” available to a party should be received. The Act distinguishes between first-hand from more remote hearsay (which is generally regarded as too unreliable to be admissible), and provides an exception to the rule for first-hand hearsay where the maker of the representation, having personal knowledge of what he or she intended to assert, is or is not available to be called to give evidence about the asserted fact (ss 63-66), and reasonable notice is given to the other party of the intention to call that evidence (s 67).³³ The exception as it applies to civil proceedings where the maker is available (s 64) was recently amended. Section 64 previously required that the occurrence of the asserted fact was “fresh in the memory” (within the meaning of *Graham v The Queen*)³⁴ of the maker when making the representation, but that no longer applies.³⁵
- 27 Parties taking objections in civil proceedings to affidavits on the ground of hearsay often overlook s 64(3) where the maker of the representation in question has been or will be called to give evidence.
- 28 Section 66, which provides the first-hand hearsay exception in criminal proceedings where the maker is available, has retained the “fresh in the memory” requirement but that provision was amended so that the court, in determining whether the asserted fact was “fresh in the memory” of the

³³ Although in criminal proceedings, the Act provides more protection to the accused from being convicted on hearsay evidence where the maker is not available

³⁴ In *Graham v The Queen* (1998) 195 CLR 606, it was held that there should be a temporal connection between the occurrence of the asserted fact (the sexual assault in this case) and the making of the statement containing that fact (the complaint). The High Court said that the temporal connection had to be “recent” or “immediate.”

³⁵ As observed by S Odgers, *Uniform Evidence Law*, 9th ed (2010) LawBook Co (*Odgers*) at [1.3.1800], the removal reflected the ALRC’s recommendation, which was made on the basis that practical experience suggested that there is only slight difference in quality of hearsay evidence that satisfies the fresh in the memory requirement and evidence that does not, and in any event, it can be dealt with as a matter of weight or under the mandatory or discretionary exclusions of evidence. The Explanatory Memorandum to the Commonwealth amending bill made similar observations.

maker, may take into account relevant matters such as the nature of the event, the maker's age and health, and the period of time between when the asserted fact occurred and the representation was made (s 66(2A)). It should be noted that the Court of Criminal Appeal had already relaxed the somewhat rigid view expressed in *Graham v The Queen* as to what "fresh in the memory" means to give judges more flexibility.³⁶ It has been said that the court was already considering the factors set out in the new s 66(2A), so the amendment is likely to make little difference to its determination of whether the occurrence of the asserted fact was "fresh in the memory" of the maker.³⁷ The other first-hand hearsay exception in criminal proceedings where the maker is not available (s 65) has also been amended and is now narrower. Previously, one of the ways in which a representation was admitted under s 65 was where the representation was against the interests of the maker (now s 65(2)(d)(i)). Now the representation must also be made in circumstances that make it likely that it is reliable (s 65(2)(d)(ii)).

- 29 As for other exceptions to the hearsay rule, a previous representation adduced for a non-hearsay purpose, that is, for some other reason than to prove the truth of the asserted fact, is not subject to the hearsay rule (s 60). Section 60 was recently amended to provide that second-hand or more remote hearsay can be admitted for a non-hearsay purpose.³⁸ Other

³⁶ See e.g. *Gordon-King v The Queen* [2008] NSWCCA 335, decided before the amendment took effect, which referred to *Skipworth v The Queen* [2006] NSWCCA 37 and *Langbein v The Queen* [2008] NSWCCA 38. In the former, it was held that a 66 day gap did not mean that the fact was not "fresh in the memory", and in the latter, it was held that 85 days was too long. In *Gordon-King*, McClelland CJ in CL stated at [20]: "As each of these decisions indicates, the question which the court must answer will depend upon the facts of the particular case. As the extract from his Honour's reasons makes plain the trial judge had regard, not only to the lapse of time, but to the unique nature of the event which the complainant alleged had occurred. This was not a case, as was *Langbein*, where the allegation was of a series of sexual assaults over a period of time where the prospect of a confused recollection was a real possibility. The allegation in the present case was of a single event which had occurred 47 days previously. In these circumstances I am satisfied that the decision of the trial judge was open to him and the challenge to the admission of the evidence of DF must fail."

³⁷ See *Howie Evidence Amendments* at 36.

³⁸ The amendment was required because s 62 provides that a reference to a previous representation in Division 2 of Part 3 was effectively only to first-hand hearsay. The amendments

significant exceptions to the hearsay rule include the business records exception (s 69)³⁹ and hearsay evidence adduced in interlocutory proceedings (s 75).⁴⁰

30 **Opinion evidence:** The opinion rule excludes evidence of an opinion adduced to prove the existence of the fact on which the opinion is expressed (s 76). Underlying the rule is the broad principle that, whenever the point is reached at which the court is being told something that it is entirely equipped to determine on its own (for instance, to draw inferences from data) because it is in possession of the same material or information as the witness, the witness's testimony is superfluous, merely encumbers the proceedings and should be dispensed with.⁴¹

31 However, the evidence of witnesses with certain "special" skill or expertise has been regarded as being capable of providing assistance to the court. The Act reflects this by providing an exception for expert evidence, that is, where a person has specialised knowledge based on training, study and experience, and gives evidence of an opinion wholly or substantially based on that knowledge (s 79). Other exceptions include non-expert opinions based on what a witness saw, heard or otherwise perceived about a matter or event (s 78), and opinion evidence admitted for a purpose other than to prove the facts on which the opinion was expressed (s 77), which mirrors s 60. Opinion evidence may not be excluded simply because it is about a matter of common knowledge or an ultimate issue in the proceeding (s 80).

32 Examples of opinion evidence are a statement made by a qualified accountant and insolvency practitioner, based on financial accounts and

were made in response to the High Court's decision in *Lee v The Queen* [1998] HCA 60; (1998) 195 CLR 594.

³⁹ Which I discuss below at paragraph [60] and following

⁴⁰ Provided the party adducing the hearsay evidence also adduces evidence of its source.

other company records, as to the solvency of a company,⁴² and a statement by a valuer as to the value of land.⁴³

33 The opinion rule has given rise to a number of issues about the admissibility of expert evidence and hearsay evidence. I will canvass these issues in sections C and D below.

34 It should be noted that the hearsay and opinion rules do not apply to evidence of an admission in civil and criminal cases (s 81). There are exceptions to this, particularly in criminal proceedings to ensure that the accused is not convicted on unreliable evidence. For instance, s 85 excludes evidence of admissions made to police officers or investigating officers unless the circumstances in which the admissions were made were such as to make them reliable. The scope of this provision has been widened. Where previously it only applied to admissions arising "*in the course of police questioning*," it now applies where admissions are made to, or in the presence of, an official who was "*performing functions in connection with the investigation or possible investigation of an offence*."⁴⁴

35 Further, following the recent amendments to the Act, the hearsay rule and opinion rules no longer exclude evidence of representations about the existence or content of Aboriginal and Torres Strait Islander traditional laws and customs (ss 72, 78A).⁴⁵ The amendments should overcome the difficulties typically encountered in adducing such evidence, namely, the

⁴¹ See e.g. *Wigmore on Evidence* (1st ed) at §1018

⁴² *Quick v Stoland* (1998) 87 FCR 371 at 375 per Branson J

⁴³ *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* [2009] NSWSC 49 per Barrett J

⁴⁴ This amendment was in response to *Kelly v The Queen* [2000] HCA 12; (2004) 218 CLR 216, where the High Court held that an admission made to a police officer after completion of a video-recorded interview and not in response to any question by a police officer was not made "*in the course of police questioning*." Such an admission would now fall within the scope of the amended provision, which may also extend to admissions made where the accused is before a custody officer: see *Howie Evidence Amendments*.

⁴⁵ The Dictionary to the Act broadly defines "*traditional laws and customs*" of an Aboriginal or Torres Strait Islander group (including a kinship group) to include "*any of the traditions, customary laws, customs, observances, practices, knowledge and beliefs of the group*."

hearsay nature of the evidence due to the tradition of handing down knowledge about laws and customs through the generations, and the potential difficulties in establishing that evidence is given by persons with specialised knowledge based on training, study or experience.

- 36 **Evidence of a decision or finding of fact in another proceeding:** The Act provides that such evidence is inadmissible to prove the existence of a fact that was in issue in that proceeding (s 91). The common law also considered such evidence inadmissible, as it perceived it to be proof merely of another court's opinion.⁴⁶ However, there is no restriction on adducing evidence of another judgment to prove its existence, date or legal effect, or to assist the court in ascertaining the parties to those proceedings, the issues raised, and whether the present proceedings are in fact parallel, or substantially parallel to and dependent upon, the other proceedings.⁴⁷
- 37 Even where evidence is admitted as relevant for another purposes, it cannot be used contrary to s 91 (s 91(1)).
- 38 There are exceptions to this rule, such as to prove the grant of probate, letters of administration or other similar orders to prove the death or date of death of a person, or due execution of a testamentary document (s 92(1)).
- 39 **Tendency and coincidence evidence:** The tendency rule (s 97) and coincidence rule (s 98) restrict evidence from being used to prove tendency or to show the improbability of coincidence. At common law, this was known as propensity or similar fact evidence. The purpose of the tendency and coincidence rules is to alleviate the dangers of the inferential

⁴⁶ See *National Mutual Life Association of Australasia Ltd v Grosvenor Hill (Qld)* [2001] FCA 237; (2001) 183 ALR 700 at [46]-[50].

reasoning based on tendency and coincidence evidence. The danger is that the evidence allows a person to be judged by his or her conduct on other occasions, rather than on evidence focusing on the event in question. Such evidence throws up collateral issues, such as whether a person did or did not do something in similar circumstances, which may be as contestable as the issues in the case in hand.

40 The rules operate as contingent exclusionary rules – that is, they exclude the evidence unless reasonable notice has been given and the court forms the view that the evidence would have significant probative value. Even if the evidence is admitted for another purpose, it cannot be used for a tendency or coincidence purpose unless it satisfies ss 97 and 98 (s 95).⁴⁸

41 As part of the recent amendments, the threshold for the admissibility of coincidence evidence was amended. A lower standard was introduced, so that the court may now have regard to “*any similarities in the events of the circumstances*” in which the allegedly coincidental events occurred to determine whether to admit the evidence (s 98(1)).

42 **Credibility evidence:** The credibility rule excludes credibility evidence about a witness (s 102). “Credibility evidence” is evidence in relation to a witness or other person that either is relevant only to the person’s credibility, or where it is relevant to credibility and for some other purpose for which it is inadmissible or cannot be used (e.g. because it is hearsay evidence) (s 101A).⁴⁹ Previously, the credibility rule only excluded

⁴⁷ See *National Mutual Life Association of Australasia Ltd v Grosvenor Hill (Qld)* [2001] FCA 237; (2001) 183 ALR 700 at [50].

⁴⁸ As well as s 101 (if applicable), which contains further restrictions on the Crown’s adducing tendency or coincidence evidence.

⁴⁹ This was inserted to address the consequences of the High Court’s decision in *Adam v The Queen* [2001] HCA 57; (2001) 207 CLR 96, where the High Court interpreted the credibility rule (before it was amended) as excluding evidence only relevant to credibility but not evidence that was relevant for some other purpose even if it was inadmissible for that purpose.

evidence that was relevant only to a witness's credibility, and there was no defined category of "credibility evidence".

43 There are various exceptions. Credibility evidence may be adduced to discredit a witness, for instance, the evidence may be adduced in cross-examination of a witness if it could substantially affect the assessment of the witness's credibility (previously the exception applied if the evidence "*has substantive probative value*"),⁵⁰ where the court gives leave in criminal proceedings,⁵¹ or to rebut a witness's denials or refusals to admit or agree to evidence in cross-examination.⁵² It may also be adduced to accredit the witness, such as in re-examination.⁵³

44 The credibility rule now also applies to persons not called as witnesses, for example, makers of hearsay statements⁵⁴ and experts⁵⁵. The definition of "credibility evidence" in s 101A extends to such persons.

45 **Character evidence:** The admissibility of character evidence arises only in criminal proceedings.⁵⁶ An accused may adduce evidence to prove his or her good character generally or in a particular respect, and the hearsay, opinion, tendency and credibility rules do not exclude such evidence (s 110). If that evidence is adduced, the Crown may adduce rebuttal evidence. An accused can also adduce expert evidence relevant to the character of a co-accused (s 111). The Crown cannot cross-examine an accused on matters arising out of character evidence without the court's leave (s 112). The rationale behind these provisions is that if the legal

⁵⁰ Section 103.

⁵¹ Section 104

⁵² Section 106

⁵³ Section 108

⁵⁴ Section 108A

⁵⁵ Section 108C

⁵⁶ Section 109. See e.g. Kirby J's judgment in *Melbourne v The Queen* (1999) 198 CLR 1 for a discussion of character evidence. Although his Honour was in dissent, his summation of the issues and history relating to character evidence remains relevant.

system is to minimise the risk of wrongful conviction, it should give the accused the right to introduce evidence of his good character.⁵⁷

46 The common law remains relevant for understanding what constitutes character evidence under the Act.⁵⁸ The common law accepts evidence of a person's reputation ("*the public estimation or repute of a person, irrespective of the inherent moral qualities of that person*") and disposition ("*which is something more intrinsic to the individual in question*").⁵⁹

47 There is no rule requiring a trial judge to direct the jury as to the accused's good character,⁶⁰ although it may be argued that it is desirable that the judge does so.⁶¹

48 **Identification evidence:** As with character evidence, the question of admissibility of identification evidence arises only in criminal proceedings.⁶² The provisions in the *Evidence Act* governing the admissibility of identification evidence are concerned with alleviating the potential dangers and prejudice to the accused where the Crown adduces such evidence.

49 The Act excludes "identification evidence" of an accused based wholly or partly on what a witness saw (other than "picture identification evidence"), unless an identification parade has been held by police (or it would not have been reasonable to have held such a parade or the defendant refused to take part in the parade), and the identification was made without the witness having been intentionally influenced to identify

⁵⁷ See ALRC Interim Report No. 26 referred to in note 17 above, Vol 1 at [802].

⁵⁸ See Kirby J's judgment in *Melbourne v The Queen* [1999] HCA 32; (1999) 198 CLR 1; see also *Eastman v The Queen* (1997) 76 FCR 9, referring to the decision of the High Court in *Attwood v The Queen* (1960) 102 CLR 353 at 359 on what "good character" means.

⁵⁹ *Melbourne v The Queen* [1999] HCA 32; (1999) 198 CLR 1 at [33]-[35], [64]-[72].

⁶⁰ *Melbourne v The Queen* [1999] HCA 32; (1999) 198 CLR 1 at [30], [75]-[77], [155].

⁶¹ See e.g. *R v Soto-Sanchez* [2002] NSWCCA 160; (2002) 129 A Crim R 279 at [27]-[29]; *R v Hart* [2002] NSWCCA 313; (2002) 131 A Crim R 609 at [11]-[13].

the accused (s 114). Further, “picture identification evidence” (which includes photographic identification) adduced by the Crown is inadmissible in a number of situations (s 115), e.g. where the pictures examined suggest that the persons photographed are in police custody.

50 The Act’s definition of “identification evidence” incorporates important limitations.⁶³ Broadly, it means an assertion by a person (based wholly or partly on what the person saw, heard or otherwise perceived) that the defendant was or resembles a person present at or about the time the crime (or connected act) in question was committed, or hearsay evidence of the assertion. This definition would not include evidence of identification of someone other than the defendant or of an object, security surveillance footage, evidence of identification made by a tracker dog, DNA evidence, or fingerprint evidence. However, in some ways, it is a broad definition as the resemblance can be “visually, aurally or otherwise”, which would include identification by touch, smell and gait.

51 To alleviate the potentially prejudicial effect of identification evidence, if it has been admitted, the judge must inform the jury that there is a special need for caution before accepting the evidence and the reasons for that caution generally and in the circumstances of the case (s 116). No special form of words is required. It should be noted that even if identification evidence is admitted, the court retains discretion to exclude it under ss 135 and 137 (discussed below).

52 **Privileges:** There are extensive provisions in the *Evidence Act* that protect privileged material from disclosure. The Act protects certain confidential communications and contents of confidential documents made or prepared for the dominant purpose of the lawyer providing legal advice to

⁶² Section 113.

⁶³ For a discussion of what is and is not identification evidence, see *Smith v The Queen* (2001) 206 CLR 650; [2001] HCA 50.

the client (s 118) or for the dominant purpose of the client being provided with professional legal services in relation to anticipated or pending proceedings (s 119). When s 118 was enacted, it represented a divergence from the “sole purpose” test then applied to a common law claim for privilege. It was not until *Esso Australia Resources Ltd v Commissioner of Taxation* [1999] HCA 67; (1999) 201 CLR 49 that the majority of the High Court ruled that the “dominant purpose” test for legal professional privilege applied at common law (overruling the “sole purpose” test propounded in *Grant v Downs* (1976) 135 CLR 674).⁶⁴ Section 119 sets a narrower test than the one at common law because the relevant dominant purpose in s 119 is not that the communication or document be for the purpose of use in litigation (the common law test) but that it be for the purpose of the client being provided with professional legal services in relation to the proceedings.⁶⁵ This is significant in respect of privilege that is claimed to attach to the “final” version of affidavits (i.e. affidavits that have been sworn and filed). Such affidavits or witness statements may have been prepared for the dominant purpose of use by the party in litigation (which meets the common law test), but that is not the same as their having been brought into existence for the dominant purpose of being provided with professional legal services for litigation (see *Buzzle Operations v Apple Computer Australia* [2009] NSWSC 225; (2009) 74 NSWLR 469).

- 53 Further issues that arise are whether the *Evidence Act* applies to the exclusion of the common law, whether the relevant privilege arises and whether it has been lost (ss 121-126). There are other privileges, such as sexual assault communications privilege in limited civil proceedings (s 126G), religious confessions (s 127) and the privilege against self-

⁶⁴ The “dominant purpose” test adopted by ss 118 and 119 is intended to reflect that proposed by Barwick CJ (in dissent) in *Grant v Downs* (1976) 135 CLR 674 at 678.

⁶⁵ As observed in *Buzzle Operations v Apple Computer Australia* [2009] NSWSC 225; (2009) 74 NSWLR 469 at [14]-[20].

incrimination (s 128), which now also applies to a person who is required to disclose information as part of, or in connection with, a search or freezing order in civil proceedings (s 128A).⁶⁶ There is a miscellany of exceptions to the privilege provisions, which I will not spell out. Section 122, which deals with waiver of privilege, has been a particularly fertile source of dispute.

54 I should point out the recent amendments to s 128, which concerns the privilege against self-incrimination. In brief, s 128 provides that where a witness objects to giving evidence that may tend to incriminate him or her in respect of offences under Australian or foreign laws or prove liability to a civil penalty, and the court requires the giving of that evidence, the court must issue a certificate to the witness under s 128. The certificate prevents the incriminating evidence from being used against him or her in other proceedings (other than in criminal proceedings in respect of the falsity of the evidence).

55 An important amendment was to entrench the grant of a certificate so that its protection continues despite any challenge or review of the decision to grant the certificate (s 128(8)).⁶⁷ Another significant amendment was to extend the scope of a s 128 certificate. Where previously it applied only “in

⁶⁶ In the NSW Act, this applies to freezing, search or other orders under Part 25 of the UPCR; the Commonwealth Act applies to an order made by a federal or ACT court in civil proceedings. The provision does not apply to corresponding orders under proceeds of crime legislation.

⁶⁷ The amendment was in response to *Cornwell v R* [2007] HCA 12; (2007) 231 CLR 260, where the High Court held that in the absence of any legislative provision to the contrary, a judge was not bound by the grant of a s 128 certificate by another judge any more than he or she was bound by any other evidential ruling previously made (at [94]). The second reading speech to the *Evidence Amendment Bill 2007* (NSW) explained that s 128(8) was introduced to ensure that the grant of the certificate is not the same as any other evidential ruling (to overcome *Cornwell*), and that “to ensure that the policy of section 128 is carried into effect, the witness must be certain of being able to rely on that certificate in future proceedings.” In *Cornwell*, there was also an issue as to whether the accused could use the certificate in a re-trial. Section 128 has also been amended to clarify its operation in criminal proceedings by the insertion of sub-section (9), which has the effect that an accused cannot use a certificate to prevent the use of their evidence in a re-trial for the same offence or a trial for an offence arising out of the same facts. See Legislative Counsel, Second reading speech for *Evidence Amendment Bill 2007* (NSW), 24 October 2007, accessible at

a proceeding in a NSW court,"⁶⁸ it now also applies where evidence is given before a person or body authorised by a NSW law or the parties' consent to hear, receive or examine evidence (s 128(7)). That would encompass taking evidence on commission,⁶⁹ as well as evidence given before bodies with power to hear, receive and examine evidence, even if not bound by the rules of evidence.⁷⁰

56 Further, s 128 was previously limited to the witness's objection to giving "*particular evidence,*" but it now also applies to the giving of "*evidence on a particular matter*" (s 128(1)). This would cover a witness giving evidence on a topic, in contrast to evidence given in response to particular questions. The sub-sections governing the process by which the court provides a certificate to the witness have also now been framed in plainer language and re-ordered.

57 Section 128 was previously often thought to apply only to evidence given in cross-examination but not in chief or in re-examination. However recent authority has re-examined this issue, and this is discussed below at paragraphs [102] and following.

58 I conclude this broad overview of the *Evidence Act* with one final comment on the admissibility of evidence. Although, strictly speaking, the Act dictates that certain evidence is inadmissible, the Act provides a measure

<[http://www.parliament.nsw.gov.au/Prod/parlment/nswbills.nsf/0/23935cf736453a95ca257376001e5726/\\$FILE/LC%204607.pdf](http://www.parliament.nsw.gov.au/Prod/parlment/nswbills.nsf/0/23935cf736453a95ca257376001e5726/$FILE/LC%204607.pdf)>.

⁶⁸ The Dictionary to the Act defines "NSW court" to mean the Supreme Court, or any other court created by Parliament, and includes any person or body (other than a court) that, in exercising a function under the law of the State, is required to apply the laws of evidence.

⁶⁹ Under the *Evidence on Commission Act 1995* (NSW)

⁷⁰ This would include bodies that are not bound by rules of evidence and are therefore not "NSW courts" as defined in the Act, such as the Independent Pricing and Regulatory Tribunal (see *Independent Pricing and Regulatory Tribunal Act 1992* (NSW), s 20), the Administrative Decisions Tribunal (see *Administrative Decisions Tribunal Act 1997* (NSW), although s 73(2) states that the Tribunal is not bound by rules of evidence, s 73A states s 128 applies to proceedings before it), and the Consumer Trader and Tenancy Tribunal (see *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW), s 28(2)).

of latitude in civil proceedings if the evidence in question relates to an issue that is not in genuine dispute or if the application of the rules would cause or involve unnecessary expense or delay. Where either of these conditions arises, the court may waive certain rules of evidence (namely, the general rules about giving evidence and adducing evidence from witnesses, documents or other forms of evidence,⁷¹ and the rules as to admissibility other than those on relevance and identification and privileged evidence) (s 190(3)(b)).⁷² This is consistent with s 56 of the *Civil Procedure Act 2005* (NSW), which requires the “*just, quick and cheap resolution of the real issues in the proceedings.*” It is important for parties to take into account both s 190(3)(b) of the *Evidence Act* and s 56 of the *Civil Procedure Act* in preparing for trials, particularly when taking objection to the opposing party’s evidence. The court may also waive these rules of evidence with the parties’ consent (s 190(1)). In criminal proceedings, the accused’s consent is only effective if he or she has been advised to consent by his or her legal representatives, or if the court is satisfied that the accused understands the consequences of consenting (s 190(2)).

59 In contrast, even if evidence is admissible because it is not barred by the above rules, the court may exclude it or limit its use. The court has a general discretion to exclude evidence if its probative value is substantially outweighed by the danger that the evidence might be unfairly prejudicial to a party, be misleading or confusing, or cause or result in undue waste of time (s 135). A general discretion also exists to limit the use of evidence if there is a danger that a particular use of evidence might be unfairly prejudicial to a party or be misleading or confusing (s 136). In criminal proceedings, the court must exclude evidence adduced by the Crown if its probative value is outweighed by the danger of unfair prejudice to the defendant (s 137). Finally, s 138

⁷¹ Part 2.1 and Divisions 3, 4 and 5, Part 2.2, Part 2.3 of the *Evidence Act*

⁷² Section 190(4) sets out the matters that the court must take into account in deciding whether to exercise its discretion to waive rules of evidence.

requires the court to exclude evidence that has been obtained improperly or in contravention of Australian law (or in consequence of such impropriety or contravention), unless the desirability of admitting it outweighs the desirability of admitting evidence obtained improperly or illegally.⁷³

C. Admissibility of evidence that is fact and opinion: the relationship between the hearsay rule, business records exception and opinion rule

60 As with many rules of evidence, the hearsay rule and its exceptions are easy to state but can be difficult to apply in different situations. One such situation is whether and how the rule operates to exclude evidence that could be characterised both as a fact and an opinion. This raises the question of whether the evidence is one of fact or opinion. That distinction may be said to be important because the hearsay rule applies to “asserted facts.”

61 Neither “fact” nor “opinion” is defined in the *Evidence Act*. In *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd (No 5)* (1996) 64 FCR 73, Lindgren J said that for the purposes of the opinion rule, an “opinion” was “*an inference from observed and communicable data.*”⁷⁴ That definition has been frequently cited with approval⁷⁵ and applied on a number of occasions. For example, it was held that evidence given by a person about his or her state of mind in an actual or hypothetical situation is a statement of fact (as it does not involve the drawing of an inference).⁷⁶

A statement that information available to the National Crime Authority

⁷³ For a recent application of s 138, see *ASIC v Sigalla (No 2)* [2010] NSWSC 792

⁷⁴ At 75

⁷⁵ See e.g. *Hughes Aircraft Systems International v Air Services Australia* (1997) 80 FCR 276 at 279-280; *Guide Dog Owners' and Friends' Association Inc v Guide Dog Association of NSW and ACT* (1998) 154 ALR 527 at 532; *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 529 at [6]; *Connex Group Australia Pty Ltd v Butt* [2004] NSWSC 379 at [10].

⁷⁶ *Seltsam Pty Ltd v McNeill* [2006] NSWCA 158 at [123] per Bryson JA, Handley and Tobias JJA agreeing

did not identify any particular suspect in relation to any offence was also held by the Full Court of the Federal Court to be a statement of fact and not one of opinion.⁷⁷ The Full Court of the Federal Court said that this was no more an inference than would be a statement that a file did not contain any document printed on yellow paper.⁷⁸ With respect, the latter is an observation involving no judgment, reasoning or deduction, whereas the former involves an assessment or process of reasoning requiring conclusions to be drawn as to the effect of material available to the Authority. Whilst a statement that the relevant officers did not suspect a particular person of the offence would be one of fact, one might think that a statement that information available to the Authority did not identify any particular suspect was an opinion, being an inference from observed data, even if it was also a statement of fact.

62 The courts have rightly noted that there is no clear dichotomy between fact and opinion.⁷⁹ It follows that one cannot say that because a statement is one of fact, it is cannot also be one of opinion, and vice versa.

63 The issue may be illustrated with the following scenario. In a trial, a party seeks to tender a report prepared by a registered valuer on the valuation of land to prove the value of the land. One of the issues in dispute is the value of the land, so the report is prima facie relevant for the purposes of sections 55 and 56. The report contains statements concerning what the valuer considers to be the value of the land. A statement by a valuer along the lines of “*In my opinion, the value of the land is \$X*” is an opinion expressed by the valuer on a fact (i.e. value). Thus, one immediately thinks of the opinion rule potentially applying to exclude the report.

⁷⁷ *Bank of Valletta plc v National Crime Authority* (1999) 90 FCR 565 at 569-570

⁷⁸ At 570.

⁷⁹ See e.g. *Quick v Stoland* (1998) 87 FCR 371 at 375; *Ringrow Pty Ltd v BP Australia Ltd* [2003] FCA 933; (2003) 130 FCR 569 at [16]; *Connex Group Australia Pty Ltd v Butt* [2004] NSWSC 379 at [3]; *Ritz Hotel Ltd v Charles of the Ritz Ltd (No 20)* (1987) 14 NSWLR 124 at 127. The absence of the dichotomy was also discussed by Wigmore (see 1st ed of *Wigmore on Evidence* at §1919)

- 64 It may be argued that it is also a statement of fact, which raises the question as to whether the hearsay rule also applies. If it does, the valuation report is inadmissible to prove the value of the land stated in the report, unless an exception to the hearsay rule applies.
- 65 Justice Hely in *Ringrow Pty Ltd v BP Australia Ltd* [2003] FCA 933; (2003) 130 FCR 569 considered the application of the hearsay rule to a valuation report tendered to prove the value of land. Justice Hely and the parties proceeded on the basis that the admissibility of the report was precluded by the hearsay rule unless the business records exception in s 69 applied (subject further to the court's discretion to exclude evidence under s 135). Section 69 provides:

“69 Exception: business records

- (1) *This section applies to a document that:*
- (a) *either:*
 - (i) *is or forms part of the records belonging to or kept by a person, body or organisation in the course of, or for the purposes of, a business, or*
 - (ii) *at any time was or formed part of such a record, and*
 - (b) *contains a previous representation made or recorded in the document in the course of, or for the purposes of, the business.*
- (2) *The hearsay rule does not apply to the document (so far as it contains the representation) if the representation was made:*
- (a) *by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact, or*

- (b) *on the basis of information directly or indirectly supplied by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact.*
- (3) *Subsection (2) does not apply if the representation:*
- (a) *was prepared or obtained for the purpose of conducting, or for or in contemplation of or in connection with, an Australian or overseas proceeding, or*
 - (b) *was made in connection with an investigation relating or leading to a criminal proceeding.*
- (4) *If:*
- (a) *the occurrence of an event of a particular kind is in question, and*
 - (b) *in the course of a business, a system has been followed of making and keeping a record of the occurrence of all events of that kind,*
- the hearsay rule does not apply to evidence that tends to prove that there is no record kept, in accordance with that system, of the occurrence of the event.*
- (5) *For the purposes of this section, a person is taken to have had personal knowledge of a fact if the person's knowledge of the fact was or might reasonably be supposed to have been based on what the person saw, heard or otherwise perceived (other than a previous representation made by a person about the fact)."*

66 I note that Sperling J, in referring to the business records exception, explained in *Roach v Page (No 27)* [2003] NSWSC 1046 (at [11]) that:

"The thinking behind the section is clear enough. Things recorded or communicated in the course of the business and constituting or concerning business activities are likely to be correct. There is good

reason for the courts to afford to such records the same kind of reliability as those engaged in business operations customarily do."

67 Similarly, the High Court in *Potts v Miller* (1940) 64 CLR 282 stated that the rationale for the business records exception is that (at 304):

"...records of modern industrial activities in which the facts are complex and the persons concerned so numerous that no one of them has an accurate recollection of the whole chain of events, or, indeed, ever had a complete knowledge of it. The record itself in these cases is in effect the best and only evidence of the transaction. If it is identified, and its correctness and regularity are established, there is no sound reason why it should not be accepted as proof of great value."

68 In considering whether s 69 applied, Hely J analysed the issue in this way:

- a the distinction between fact and opinion is not clear-cut but "*at least in some contexts 'fact' may include an opinion*" (at [18])
- b the value of property as at a particular date is a question of fact which is usually determined by calling opinion evidence from a qualified expert (at [15]). His Honour also considered that whether valuable goodwill existed in relation to a particular business at a particular time is a question of fact.
- c the hearsay rule applied to the valuation reports. The "*asserted fact*" to which the rule applied was the "*expression of opinions by the valuers contained in the valuation reports*" (at [14])
- d the conclusion that the hearsay rule applied was supported by having regard to s 111 of the *Evidence Act*, which assumes that that hearsay rule can apply to opinion evidence (at [18])

- e if the hearsay rule applied, then so did the exceptions to the rule, such as the business record exception in s 69
- f the business exception rule in s 69 was satisfied. Section 69(2)(a) requires that the person who made the representation must have “personal knowledge” of the asserted fact. In the present case, the valuers had personal knowledge of the asserted fact because it consisted of opinions which they themselves had formed and expressed (at [19]). Section 69 is to have a facilitative effect and is to be construed broadly (see *Lewis v Nortex Pty Ltd (in liq)* [2002] NSWSC 1083 at [4]), such that “it is capable of operation even if the asserted fact is an opinion in relation to a matter of fact” (at [18]).

69 Four points should be made in respect of *Ringrow*.

70 First, his Honour had earlier concluded that for the purposes of the business records exception, the valuation reports were, or formed part of, records kept by a person, body or organisation in the course of, or for the purposes of, a business (s 69(1)(a)) and that the representations in the document were made or recorded in the course of, or for the purposes of, the business (s 69(1)(b)). This conclusion applied to the businesses of the valuers as well as of the persons for whom the valuers prepared the valuation reports (at [12]).

71 The reports were prepared for St George Bank (at its request) for lending purposes and were addressed to the bank. Thus Hely J was able reasonably to infer that, at some point in time, the reports formed part of the records of the bank in the course of, and for the purpose of, its business, and that representations in the report were made for the purposes of the bank’s business (at [11]-[12]).

- 72 In *Roach v Page (No 15)* [2003] NSWSC 939, Sperling J indicated that a valuation report prepared by a valuer does not form part of the “records” of the valuer’s business. Rather, it is a product of the valuer’s business and therefore the criteria in s 69(1) are not met.⁸⁰ Although s 69 is drafted broadly, the section works on the presumption that documents created in the course of, or for the purposes of, a business to record business activities are reliable and accurate. In contrast, a document created to be sold as part of the business should not necessarily be considered to have that same attribute.⁸¹
- 73 Secondly, if the representations as to value in the valuation reports were not considered representations of “asserted facts” (such that s 69 would not apply), that does not mean the valuation reports are inadmissible. The business records exception in s 69 mirrors the hearsay rule itself in s 59. If a statement of opinion were not a statement of an asserted fact, the consequence is not that it is inadmissible as hearsay. It would not fall within the hearsay rule in the first place.⁸² Its admissibility would only be subject to the opinion rule, as well as the court’s mandatory and discretionary exclusions.
- 74 Thirdly, *Ringrow* is not authority for the proposition that evidence that escapes the hearsay rule is free from any other bars to admissibility. Where evidence may be characterised as both fact and opinion and is not precluded by the hearsay rule (e.g. because one of the exceptions applies), it must still satisfy the opinion rule in order to be admitted into evidence, subject further to the court’s discretionary and mandatory exclusions.

⁸⁰ *Roach v Page (No 15)* has been approved and applied in other decisions, e.g. *Silver v Dome Resources NL* [2005] NSWSC 348 at [7]; *ASIC v Rich* [2005] NSWSC 417 at [180]-[182]; *Hansen Beverage Company v Bickfords (Australia) Pty Ltd* [2008] FCA 406 at [129]-[133].

⁸¹ See *Hansen Beverage Company v Bickfords (Australia) Pty Ltd* [2008] FCA 406 at [131].

- 75 It could be argued that in *Ringrow*, Hely J treated the reports as having been tendered for a hearsay purpose, that is, to prove, as an “asserted fact,” that each valuer held a particular opinion as to the value of the land. Because a statement by a valuer that “*In my opinion, the value of the land is \$X*” also expressed an opinion on a fact, it was also subject to the opinion rule. In *Ringrow*, Hely J had observed that, “*it was not contended that [the valuers] were not qualified to express whatever opinions are contained in their valuation reports*” (at [15]). Thus, the valuers’ evidence would not have infringed the opinion rule because the exception for opinions based on specialised knowledge in s 79 would have been available.
- 76 This interpretation of *Ringrow* was not followed in *Australian Securities and Investments Commission v Rich* [2005] NSWSC 417; (2005) 216 ALR 320, where Austin J said that he understood *Ringrow* as “*proceed[ing] on the basis that if the valuation evidence before the court was protected by s 69, it was admissible without recourse to the opinion rule and its exceptions*” (at [210]).
- 77 In *ASIC v Rich*, Austin J also held (at [212]-[216]) that financial records admitted pursuant to the business records exception to the hearsay rule are not subject to the opinion rule because the rule (and its exceptions) applied only to opinion evidence given in court and not to out of the court opinions. I declined to follow this view in *In the Matter of Enviro Energy Australia Pty Ltd (in liquidation)* [2010] NSWSC 1217 at [6]-[8]. In *Jackson v Lithgow City Council* [2010] NSWCA 136, Basten JA said that “*the statutory basis for such a conclusion may be doubted.*” Further, the Court of Appeal in *Jackson v Lithgow City Council* [2010] NSWCA 136⁸³ and *Jackson v Lithgow City Council* [2008] NSWCA 312⁸⁴ and the Court of Criminal Appeal in *R v Whyte* [2006] NSWCCA 75⁸⁵ assumed that hearsay evidence of an opinion

⁸² See *Young v Coupe* [2004] NSWSC 546 at [11]-[14]

⁸³ At [56]-[76].

⁸⁴ At [37], [44]-[47] (in the context of a business record and s 78)

⁸⁵ At [29]-[36] (in the context of hearsay evidence of a complaint of rape and s 78)

that is not rendered inadmissible by s 59 must still meet the requirements for admissibility of opinion evidence.

78 Lastly, in New South Wales, expert evidence must comply with the Expert Witness Code of Conduct contained in the Uniform Civil Procedure Rules in order to be admissible unless the court orders otherwise. This issue is discussed in further detail below in paragraph [87] and following.

79 It is worth noting that where business records are concerned, a party may procure their admissibility by relying on s 1305 of the *Corporations Act 2001* (Cth), which provides:

“Admissibility of books in evidence

(1) *A book kept by a body corporate under a requirement of this Act is admissible in evidence in any proceeding and is prima facie evidence of any matter stated or recorded in the book.*

(2) *A document purporting to be a book kept by a body corporate is, unless the contrary is proved, taken to be a book kept as mentioned in subsection (1).”⁸⁶*

80 As mentioned in paragraph [10] above, the *Evidence Act* does not affect the operation of other legislation (s 8). Therefore, s 1305 may be understood as overcoming any potential difficulties presented by the hearsay and opinion rules in the *Evidence Act* where the admissibility of a company’s books are concerned. However, s 1305 may not be the end of the inquiry as to admissibility. In *ASIC v Rich*, Austin J held that despite the terms of s

⁸⁶ The Corporations Act defines “books” to include “financial reports or financial records, however compiled, recorded or stored” (s 9). Section 286(1) of the *Corporations Act* imposes an obligation on companies, registered schemes and disclosing entities to keep written financial records that correctly record and explain its transactions, financial position and performance, and that would enable true and fair financial statements to be prepared and audited.

1305, the court retains a discretion to exclude a company's books under s 135 of the *Evidence Act* (at [229]-[232]), stating:

"[230] It would be surprising if Parliament had intended to require that evidence be admitted against a party in all circumstances, including circumstances where to do so would or might be unfairly prejudicial to the party, or misleading or confusing, or would or might cause or result in undue waste of time (the grounds for excluding evidence under s 135). In my opinion s 1305(1) does not purport to achieve this result. It addresses two matters: first, whether the document is admissible evidence; and secondly, the weight as evidence of the document's contents, once the document has been admitted into evidence. The second matter is premised on an assumption, namely that, the document having been rendered admissible by s 1305(1), the court has in fact admitted it into evidence. Section 1305(1) says nothing about that intermediate step. It is at the intermediate step that the discretion to exclude evidence under s 135 arises for consideration. Hence, the presence of the discretion to exclude evidence is compatible with the terms of s 1305(1).

...

"My construction of s 1305 on this point is supported by s 5E(1) of the Corporations Act, according to which the Corporations Act is not intended to exclude or limit the concurrent operation of any law of a State."

81 As his Honour notes, s 5E(1) of the *Corporations Act* concerns the concurrent operation of a State law. It is not entirely clear whether s 1305 of the *Corporations Act* and s 135 of the *Evidence Act* operate concurrently or are directly inconsistent. It may be argued that both provisions contradict each other, given that s 1305 appears unambiguously to render evidence admissible, whereas an exercise of discretion s 135 renders evidence inadmissible. If they were directly inconsistent, it may be said that s 135 of the *Evidence Act* still prevails over the s 1305 by virtue of the operation of s 5G(11) of the *Corporations Act*, which relevantly provides

that a provision of the *Corporations Act* does not operate in a State to the extent necessary to ensure that no inconsistency arises between the provision of the *Corporations Act* and the inconsistent State law. Nonetheless, on either approach, the result would be that s 135 may operate to the exclusion of s 1305.

82 His Honour did not mention s 8 of the *Evidence Act*, which provides that the *Evidence Act* “does not affect the operation of the provisions of any other Act.” If s 8 were construed to mean that the *Evidence Act* does not affect the admissibility afforded by s 1305, the court’s discretion under s 135 would be overridden by s 1305.

83 The operation of s 8 of the *Evidence Act* and ss 5E(1) and 5G(11) of the *Corporations Act* present a slight conundrum, as each seems to give way to each other. On one view, it may be argued that the reference to “Act” in s 8 is to an Act enacted by the New South Wales Parliament,⁸⁷ so that there is scope for the *Evidence Act* to affect the operation of s 1305 (as Austin J concluded). However, s 8(3) of the Commonwealth *Evidence Act* provides that “This Act has effect subject to the Corporations Act 2001 and the Australian Securities and Investments Commission Act 2001.” Although there is no corresponding provision in the New South Wales *Evidence Act*, the view could be taken that the New South Wales and Commonwealth *Evidence Acts* should be interpreted harmoniously (given the intention – or at least hopes – to create uniform evidence law throughout Australia).⁸⁸ On this approach, one would read the same limitation into s 8 of the New South Wales Act to conclude that s 1305 overrides the New South Wales

⁸⁷ This is supported by s 65 of the *Interpretation Act 1987* (NSW), which provides: “An Act passed by Parliament, or by any earlier legislature of New South Wales, may be referred to by the word “Act” alone.”

⁸⁸ See Australian Law Reform Commission, *Uniform Evidence Law*, Report No. 102 (2006), tabled before the Commonwealth Parliament on 8 February 2006, and accessible at <<http://www.alrc.gov.au/publications/report-102>>. I note that s 3(3) of the New South Wales *Evidence Act* provides that material used that may be used in interpreting that Act includes any relevant report of the Australian Law Reform Commission tabled before either House of the Commonwealth Parliament.

Evidence Act's rules on admissibility, including s 135 (and, presumably, also ss 137 and 138), although s 1305 should not affect the operation of s 136 as that provision is concerned with use, rather than admissibility, of evidence.

D. Expert evidence

(i.) Background

84 The use of expert witnesses has a long history.⁸⁹ It was not until the sixteenth century that the practice of calling witnesses was a well-settled incident of trials,⁹⁰ and until then, trials were often conducted without any witnesses, expert or lay. The advent of the institution of the jury in trials, which was firmly established by around the 1200s,⁹¹ was not accompanied by a concomitant need to call witnesses. Initially, the jury comprised men chosen as likely to be already informed of the facts as they were from the community, or at least some were from the community and would inform the other members of the relevant facts. The jury, already apprised of the facts, was charged with the task of forming opinions and reaching conclusions. The courts formulated a “rule as to conclusions”, which forbade witnesses from testifying in order to eliminate redundancies and simplify trials. It was thought that witnesses should have no role in trials; they could only testify as to mere opinion or conclusion not founded on evidence (or founded on inadmissible evidence), which would have no bearing on the trial, or if witnesses’ opinions or conclusions were founded on admissible evidence, they tended to usurp the functions of the jury. The common law retained this notion, and generally rejected the opinions of

⁸⁹ The history is described in Judge Learned Hand, “Historical and Practical Considerations regarding Expert Testimony,” (1901) 15 *Harvard Law Review* 40 (*Judge Learned Hand article*), and in *Thayer's Treatise on Evidence*, particularly Chapter III. The following brief account is drawn from these works.

⁹⁰ *Judge Learned Hand article* at 44

⁹¹ *Wigmore on Evidence* at 235

lay witnesses on the same basis.⁹² Now, this continues by virtue of the operation of the opinion rule in s 76 in the *Evidence Act*.

85 The courts eventually recognised the utility of expert evidence in settling disputes, and expert testimony was increasingly permitted. The courts distinguished between expert witnesses and lay witnesses, and allowed expert witnesses to testify as to their conclusions from facts which the expert had either observed himself or from the testimony of others.⁹³ It has been said that we are indebted to Lord Mansfield, Chief Justice of the Court of King's Bench in the latter half of the 18th century, for important contributions to the development of the principles regarding the admissibility of expert testimony and for promoting the use of expert witnesses.⁹⁴ His Lordship approached the issue by asking two questions: first, whether the subject matter was sufficiently scientific to call for an expert, and secondly, whether the expert would be permitted to give his opinion hypothetically. His Lordship's treatment of the issue has been described as follows:

"In Folkes v Chadd,⁹⁵ a question was presented of whether a bank, or dike, constructed to prevent seawater from flooding certain meadows, had

⁹² See discussion in *Connex Group Australia Pty Ltd v Butt* [2004] NSWSC 379 at [5]-[7]

⁹³ It has been suggested that experts were used as witnesses at a time when the present exclusionary rules of evidence had not been developed or enforced: see *Judge Learned Hand article* at 50. Judge Learned Hand also discussed some of the archaic uses of expert witnesses, such as a method of empanelling special juries in disputes where resolutions of the issues required specialised knowledge, for example, the court could exercise its power to direct a jury of 12 matrons using a *writ de ventre inspiciendo* to examine a woman who claimed pregnancy in order to obtain a stay of execution of a death sentence. In 1645, the court summoned a jury of merchants to try merchants' affairs "because it was conceived that they might have better Knowledge of the Matters in Difference which were to be tried, than others could, who were not of that Profession." Expert witnesses were also used other than as jurors, such as in an appeal of mayhem in 1345, where the court summoned surgeons from London to help the court determine if a wound was fresh (to decide whether the appellant should be allowed to go to trial), and in 1494, the court called certain "masters of grammar" in assist in construing a bond containing certain doubtful words. The same usage was followed in the interpretation of pleas (when the court's Latin was a little shaky) and in commercial instruments.

⁹⁴ See James Oldham, *English Common Law in the Age of Mansfield* (2004) University of North Carolina Press at 3-76

⁹⁵ 3 Doug. 157 (1782); 3 Doug. 240 (1783)

damaged the condition of the adjacent harbour. The testimony of an engineer named Smeaton was objected to by the plaintiff because he was "going to speak, not as to facts but as to opinion." Lord Mansfield observed that the questions of the decay of the harbour and whether the removal of the bank would be beneficial were matters of science and "Of this, such men as Mr Smeaton alone can judge." Mansfield noted that he had received Smeaton's opinion testimony in other cases, and "in matters of science no other witnesses can be called." He observed that when questions of navigation of ships arose before him, he always sent for some of the Trinity House brethren,⁹⁶ and he gave other examples of cases legitimately calling for opinion testimony of experts.⁹⁷"

- 86 In modern-day litigation, the use of expert witnesses has been retained, and has certainly become a well-entrenched, ubiquitous feature of trials. There is a vast range of matters that the court must determine which attracts the provision of "expertise" claimed to assist the court. Examples range from calling experts in fields of "hard sciences", such as engineers, chemists, physicists, biologists and medical practitioners, to persons with expertise in broader disciplines, such as accountants, valuers, genealogists and economists. Broadly, the *Evidence Act* continues to recognise the potential utility of expert evidence by providing that the opinion rule does not exclude expert evidence in certain circumstances. This is contained in s 79(1), which states: "*If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.*" Expert evidence is the subject of a separate paper.

⁹⁶ Oldham in *English Common Law in the Age of Mansfield* states at note 232 that "*Trinity House brethren were retired sea captains and others with expertise in navigation. They served as assessors in the Court of Admiralty, sitting with a judge for purposes of giving advice, although not as official witnesses. Mansfield adopted this practice in the Court of King's Bench...*"

⁹⁷ Oldham in *English Common Law in the Age of Mansfield* states at note 233 that "*One example was the testimony of seal-makers with regard to the wax impression made by a seal on a document involved in a forgery case.*"

(ii.) Expert Witness Code of Conduct

87 The use of expert witness is subject to the Expert Witness Code of Conduct, which is contained in Schedule 7 to the Uniform Civil Procedure Rules 2005 (UCPR).⁹⁸ The Code of Conduct has much the same overarching objective as the “rule as to conclusions” developed centuries ago, that is, to eliminate redundancies and simplify trials. It does so by trying to focus the parties on the real issues in dispute by requiring the expert’s primary duty to be to the court, not to the party that retained it. Clause 2 of the Code of Conduct enunciates a key aspect of an expert’s role with a threefold emphasis:

- a an expert witness has an overriding duty to assist the court impartially on matters relevant to the expert witness’s area of expertise;
- b an expert witness’s paramount duty is to the court and not to any party to the proceedings (including the person retaining the expert witness);
- c an expert witness is not an advocate for a party.

88 To enforce the Code, r 31.23 of the UCPR requires expert witnesses to comply with the Code. The rule also requires experts’ reports to acknowledge and agree to be bound by the Code.⁹⁹ Rule 31.23 states:

“31.23 Code of conduct

- (1) An expert witness must comply with the code of conduct set out in Schedule 7.*

⁹⁸ This is mirrored in Practice Note CM 7 *“Expert Witnesses in Proceedings in the Federal Court of Australia”* in the federal sphere.

⁹⁹ There is no corresponding rule on a federal level.

- (2) *As soon as practicable after an expert witness is engaged or appointed:*
- (a) *in the case of an expert witness engaged by one or more parties, the engaging parties, or one of them as they may agree, or*
- (b) *in the case of an expert witness appointed by the court, such of the affected parties as the court may direct, must provide the expert witness with a copy of the code of conduct.*
- (3) *Unless the court otherwise orders, an expert's report may not be admitted in evidence unless the report contains an acknowledgment by the expert witness by whom it was prepared that he or she has read the code of conduct and agrees to be bound by it.*
- (4) *Unless the court otherwise orders, oral evidence may not be received from an expert witness unless the court is satisfied that the expert witness has acknowledged, whether in an expert's report prepared in relation to the proceedings or otherwise in relation to the proceedings, that he or she has read the code of conduct and agrees to be bound by it."*

89 In addition to the requirements in r 31.23, r 31.27 also sets out what an expert's report must include, namely the expert's qualifications, facts and assumptions on which the opinion is based, reasons for each opinion, whether a particular issue lies outside the expert's field of expertise, materials used in support, investigations relied upon and a summary of the report. No consequences are specified for breach of r 31.27. It has been said that the rule is not intended to operate as a pre-requisite to admissibility, but only seeks to improve the quality of expert evidence: *ASIC v Rich* at [333].

90 The terms “expert,” “expert’s report” and “expert witness” are defined as follows (r 31.18):

“expert, in relation to any issue, means a person who has such knowledge or experience of, or in connection with, that issue, or issues of the character of that issue, that his or her opinion on that issue would be admissible in evidence.

expert witness means an expert engaged or appointed for the purpose of:

- (a) providing an expert’s report for use as evidence in proceedings or proposed proceedings, or*
- (b) giving opinion evidence in proceedings or proposed proceedings.*

expert’s report means a written statement by an expert (whether or not an expert witness in the proceedings concerned) that sets out the expert’s opinion and the facts, and assumptions of fact, on which the opinion is based.”

91 Given these definitions, it should be understood that r 31.23(3) applies to an “expert’s report” prepared by an “expert” who may or may not have been engaged to provide an expert’s report or give opinion evidence in the proceedings.

92 This reflects a change from the previous position. Part 36, rule 13C of the Supreme Court Rules previously required a report prepared by an “expert witness” (as that expression is now defined in r 31.18) to acknowledge and agree to be bound by the Code of Conduct then contained in Schedule K to the rules.¹⁰⁰ That requirement did not arise where the report was prepared by an “expert.” Thus, it used to be argued that a liquidator preparing a report as to the solvency of a company was not giving an

¹⁰⁰ See *Investmentsource v Knox Street Apartments* [2007] NSWSC 1128 discussing this difference at [42]-[43], referring to Campbell J’s judgment in *Kirch Communications Pty Ltd v Gene Engineering Pty Ltd* [2002] NSWSC 485 (pre-UCPR).

“expert’s report” to which the rules applied because he or she had not been retained for the purposes of giving an expert’s report or opinion evidence in the proceedings. Now, that report would be an “expert’s report” that must comply with r 31.23.

93 On a number of occasions, the court has considered whether an expert’s report is admissible even though it does not contain the acknowledgement of or agreement to be bound by the Code of Conduct required by r 31.23(3). In *Investmentsource v Knox Street Apartments* [2007] NSWSC 1128, McDougall J stated that r 31.23 created a pre-requisite to admissibility of evidence beyond those set out in the *Evidence Act*, and that “as a general rule, expert evidence should not be admitted unless the expert has at the relevant time subscribed to the obligations that are ... found in Schedule 7” (at [44]-[49]).¹⁰¹

94 When considering the same question in *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* [2009] NSWSC 49; (2009) 75 NSWLR 380, Barrett J agreed with McDougall’s statement as to the general rule, describing the purpose of the rule as a “quality assurance concern: to be sure that an expert has approached the task mindfully responsibly and mindful of the importance the expression of opinion will have as part of a body of evidence placed before the court” (at [46]).

95 In *Tim Barr*, the person who had prepared the expert’s report in question was an “expert” but not an “expert witness.” Justice Barrett considered that this fact, coupled with the absence of the acknowledgement and agreement, meant that the report was inadmissible unless the court made an “otherwise order” (at [5], [16]). His Honour stated:

¹⁰¹ Shortly after this decision, the Court of Appeal in *Yacoub v Pilkington (Australia) Ltd* [2007] NSWCA 290 accepted the proposition that the UCPR could “modify the law of evidence by imposing a precondition upon the admissibility of an expert’s report” (at [59]). This was in the context of UCPR rr 31.18 and 31.19, but there seems to be no reason in principle why the approach would not be the same in respect of r 31.23.

“The true effect of [r 31.23]... is that a report that is an “expert’s report” because prepared by an “expert” who is an “expert witness” in the proceedings may not be admitted in evidence unless it contains a Schedule 7 acknowledgment by that “expert witness”; but a report that is an “expert’s report” by reason of its having been prepared by an “expert” who is not an “expert witness” in the proceedings may not be admitted in evidence at all. In either case, however, the exclusion the rule otherwise effects may be overcome by a specific order of the court as contemplated by the opening words of the rule.”¹⁰²

96 Justice Barrett stated that this conclusion was consistent with *Investmentsource* (at [15]). However, in *Investmentsource*, McDougall J had proceeded on the basis that r 31.23 applied to an expert’s report prepared by an expert (in contrast to an expert witness), and considered whether the court should make an “otherwise order” for reasons other than that it had not been prepared by an expert witness.

97 Whether the court makes an “otherwise order” turns on whether it would result in a real risk of significant prejudice to the other party or parties, and whether that prejudice can be cured. In *Investmentsource*, McDougall J did not make an “otherwise order” for the following reasons (at [50]):

“(1) Mr Williams did not prepare his report with a conscious appreciation of the obligations imposed by Schedule K (which was applicable at the time it was prepared) or Schedule 7 (which is applicable now).

(2) There is a real difference between the role of an expert retained to advise a client and the role of an expert engaged to give evidence. The former owes his or her primary obligation to the client; the latter owes his or her primary obligation to the Court. It cannot be assumed that those

¹⁰² *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* [2009] NSWSC 49; (2009) 75 NSWLR 380 at [14]

obligations are identical, or that in any given case performance of them would lead to the same outcome in terms of opinion.

(3) For the reasons given by Einstein J in [Commonwealth Development Bank of Australia Pty Limited v Claude George Rene Cassegrain [2002] NSWSC 980] and Campbell J in [United Rural Enterprises Pty Ltd v Lopmand Pty Ltd [2003] NSWSC 870], there is a real risk that an expert who has not prepared a report under the discipline of the applicable schedule will form an opinion from which, thereafter, he or she would find it difficult to retreat, even if circumstances arise that might raise this as a possibility.

(4) An expert retained to advise a client is not usually confronted with alternative expert evidence. An expert retained to give evidence usually is. In the latter case, the expert's obligations under the applicable schedule require that he or she consider the alternative material, and reconsider his or her position in its light.

(5) Under the usual order for hearing that applies in the Commercial and Technology and Construction Lists, experts are required to confer with a view to defining, refining and where possible limiting the real issues in dispute between them. The ordinary workings of the human mind to which Campbell J pointed in United Rural Enterprises at para [15] might make this process more difficult for an expert who did not start out with an appreciation of his or her obligations under the applicable schedule.

(6) In those circumstances, I think that there is a real risk of significant prejudice to Kimberly if the Colliers material is admitted to prove Mr Williams' opinions.

(7) That prejudice is exacerbated because Mr Williams is not available for cross-examination.

(8) Further, the agreement between Messrs Hillier and Feilich, which appears to draw a distinction between a valuation report and the exercise

undertaken by Mr Williams, and which implicitly suggests that the latter is not to be regarded as a valuation, enhances the risk of prejudice. "

- 98 In *Barak Pty Ltd v WTH Pty Ltd (t/as Avis Australia)* [2002] NSWSC 649, Barrett J granted the plaintiffs leave to examine their expert witness who deposed that he was aware of the Code of Conduct prior to swearing the affidavit that annexed his report. The witness said that he had read the Code, had complied with it to the best of his ability when preparing the report, and agreed to be bound by it. Justice Barrett said that it was appropriate to make an "otherwise order" because it could clearly be seen that the witness satisfied the intent of the rule. This stands in contrast to *Investmentsource* where there was no evidence that the expert had prepared the report with a conscious appreciation of the obligations under the Code.¹⁰³
- 99 In *Tim Barr*, the issue was the admissibility of an expert's report tendered by the plaintiff. The defendants had been aware of the expert's report for a long time, so the plaintiff's intention to introduce it into evidence was no surprise to the defendants. Further, one of the purposes for which the plaintiffs sought to have the expert's report in evidence was to prove the state of mind of Mr Barr on the question of value in the period after preparation and delivery of the report. Barrett J considered that the concern underlying r 31.23(3) is not relevant to that purpose, and considered it appropriate to make an "otherwise order" under r 31.23(3) allowing the report to be admitted into evidence, provided that its use was limited to that purpose under s 136.¹⁰⁴

¹⁰³ *Investmentsource v Knox Street Apartments* [2007] NSWSC 1128 at [50]. This was one of the factors that influenced McDougall J's decision to decline to make an "otherwise order."

¹⁰⁴ *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* [2009] NSWSC 49; (2009) 75 NSWLR 380 at [50]

100 Justice McDougall also made an “otherwise order” in *CJD Equipment v A & C Construction* [2009] NSWSC 1085.¹⁰⁵ Although, in contrast to *Tim Barr*, it was not suggested that terms of the Code of Conduct were present in the expert witness’s mind when preparing the expert’s report, there was no hotly contested issue in relation to the evidence conveyed by the report. Further, the defendants had used some of the material contained in the report for their own purposes (e.g. in cross-examination), and it would have been unjust to allow such use while at the same time denying the plaintiff the use of the report in whole. Justice McDougall made it clear that this was an exceptional circumstance, and was not condoning any practice of *ex post facto* adoption of the requirements of the Code of Conduct.

101 The primary reason for the Code of Conduct was to address concerns about the impartiality (or lack thereof) when a party retained a person to prepare an expert’s report or give expert evidence in proceedings. The same concern might not arise when an “expert” records statements of opinion (based on specialised knowledge acquired through training, study or experience) in a document outside a litigious context, for instance, in the course of, or for the purposes of, a business. That is not to say that an expert is always disinterested in providing opinions in the course of his or her profession. But where the expert has no reason to be partial, there may be strong grounds for admitting an expert’s report not prepared for litigation, even where the Code of Conduct has not been considered. The absence of a motive to be partial is a stronger indication of impartiality than a promise to be impartial.

¹⁰⁵ At [12]-[17]

E. Privilege against self-incrimination: s 128 certificates

102 As mentioned at paragraph [57] above, it was a commonly-held notion that s 128 could only apply to evidence given in cross-examination. The opening words of the section refer to a witness “objecting” to giving evidence (s 128(1)), and s 128(6) refers to the objection having been overruled. Thus, it could be said that where a person is seeking to give evidence in chief (or in re-examination), the person is not objecting to so doing. On that basis, s 128 does not apply. Rather, it applies when a witness is being cross-examined where objections can be made to questions asked of the witness.

103 However, in light of the recent decision of the Court of Appeal in *Song v Ying* [2010] NSWCA 237, that analysis of s 128 is not correct. In *Song v Ying* the appellants had applied for a s 128 certificate for particular evidence in chief to be given by Mr Song, one of the defendants in the proceedings. Mr Song had signed a statutory declaration in relation to the respondent/plaintiff’s assets and business interests in Australia, which were inflated to influence favourably the consideration by the Department of Immigration of the plaintiff’s then application for Australian permanent residency. Mr Song felt that he was required to adduce the evidence as part of defending the plaintiff’s claim against him. However he sought the certificate on the basis that it might tend to incriminate him in relation to those matters. The question was whether a s 128 certificate could apply to his evidence, which would be given in chief. At first instance, Ward J held that s 128 did not apply and declined to grant the certificate (*Ying v Song* [2009] NSWSC 1344).

104 In *Ferrall v Blyton; Attorney-General of the Commonwealth (Intervener)* (2000) 27 Fam LR 178; [2000] FamCA 1442, the Full Court of the Family Court held that a s 128 certificate could apply to evidence in chief. *Ferrall* had

been followed in subsequent cases, including by Brereton J in *Chao v Chao* [2008] NSWSC 584 (at [3]). Further, Campbell J (as his Honour was then) in *Ollis v Melissari* [2005] NSWSC 1016 decided that s 128 applied to evidence given in re-examination. His Honour also said it was wrong to construe the expression “*if a witness objects to giving particular evidence*” in s 128(1) narrowly by reference only to someone saying “*I object*” in response to a particular question in course of giving evidence, and further stated that a wide construction of s 128 was supported by having regard the policy behind s 128 that:

“[7] ... a way should be provided in which the claiming of a privilege against self-incrimination does not prevent a court hearing a civil case from obtaining relevant evidence, while at the same time to the extent the New South Wales Parliament has power to do so, not prejudicing in a subsequent criminal trial, the person who gives such evidence. That policy would be carried through only imperfectly if a s 128 certificate were not available concerning evidence given in re-examination. Further it would be a fundamental unfairness if a witness were encouraged by the giving of a s 128 certificate, to give evidence in relation to which he had a right to remain silent, and for the topic so opened up not to be able to be clarified by legitimate re-examination, if the cross-examination on that topic left a misleading or incomplete impression. I decline to believe that it was the intention of parliament to bring about a situation which caused that sort of fundamental procedural unfairness.”

105 In *Song v Ying*, Hodgson JA (with whom Giles and Beazley JJA agreed) upheld Ward J’s decision to refuse to grant the s 128 certificate to Mr Song. His Honour considered that s 128 is not limited to questions in cross-examination as *Ferrall* decided. His Honour stated that the question turns on whether there is a compulsion (or potential compulsion) on the witness to give the evidence, which meant it was wrong to frame the question as whether s 128 applied to evidence given in chief (at [20]):

“[I]f a witness gives evidence in chief because actually compelled to do so (by subpoena and threat of imprisonment), or because of the availability of such compulsion if he or she does not do so, there is no reason why that witness may not object to giving evidence in chief on the ground that that evidence may tend to incriminate. The question in my opinion is not whether the evidence is given in chief or in cross-examination but whether an objection under s 128 is limited to an objection to giving evidence which the witness would otherwise be compellable to give.” (emphasis added)

106 His Honour further stated:

“[26] In my opinion, it is appropriate to construe s 128 against a background of the common law, where privilege against self-incrimination was relevantly a privilege against being compelled to give evidence that might tend to incriminate; and also against a statutory framework in which witnesses are generally compellable to give evidence. A party giving evidence in chief, in response to questions from that party’s own legal representative, is not generally giving evidence which that party is, in any real sense, compellable to give: unless called by another party and asked questions in chief by that other party, a party’s evidence in chief is given entirely at the choice of that party and is not evidence that the party is compellable to give at the instance of anyone else. It is true that a party’s legal representative can ask questions in chief without specific instructions to ask them; but if the party instructed the representative to withdraw such a question, there would in my opinion be no possibility of the witness being compelled to answer the question, at least unless it was pressed by another party or the judge, in which case no doubt s 128 could apply.

[27] In all cases apart from a party giving evidence in chief or re-examination in response to questions from the party’s own legal representative, witnesses are compellable to give evidence either at the instance of the party calling them, or the party directing questions in

cross-examination, or the judge (if the judge asks questions). It is compellability of this nature that gives sense to the word “objects” in s 128(1) and makes sense of the word “require” in s 128(4). In my opinion, such motivation as a defendant may have to give evidence to avoid having a judgment entered against him or her does not amount to relevant compellability.

[28] *In my opinion, having regard to the wording of s 128 and the scope of the common law privilege which it displaced, it is not the case that a party to proceedings who is also a witness, giving evidence in chief in response to questions from the party’s own legal representative, and who wishes to give that evidence but is not willing to do so except under the protection of a s 128 certificate, “objects” to giving that evidence within the meaning of s 128(1). This is not because the witness subjectively wishes to give the evidence, but rather because there is no element of compulsion or potential compulsion which makes the expression “objects” apposite.*

[29] *This approach would not mean that a friend of a party (plaintiff or defendant) called to give evidence in the party’s case may not “object” to giving evidence within the meaning of s 128(1). Whether or not this friend wishes to support the party, this friend is compellable at the instance of the party and cannot give instructions to the party’s legal advisers as to what questions are to be asked. In those circumstances, I would not suggest that the court would need to enquire whether the friend is giving evidence because compellable, or because of a wish to give the evidence to help the party: I would say that the compellability of the witness to give the evidence at the instance of the party (subject to the provisions of s 128), and the lack of legal entitlement to refrain from giving that evidence if compulsion is sought (again subject to the provisions of s 128), is sufficient.” (emphasis added)*

107 This is consistent with the dicta of the majority of the High Court in *Cornwell v R* [2007] HCA 12; (2007) 231 CLR 260.¹⁰⁶ In *Cornwell*, the accused wanted to give certain evidence, which might have tended to incriminate him on other potential charges. However, he could only be sure of giving it in an way favourable to himself if he gave it in chief, rather than risk losing that advantage if questioned on it in cross-examination. In essence, he sought the protection of s 128 from the potentially adverse consequences of evidence that he did not, in truth, “object” to giving, but strongly wanted to give. The majority of the High Court doubted that the accused could be said to have “objected” to giving evidence for the purposes of s 128, stating:

“[111] This characterisation raises a question whether s 128(1), and hence s 128 as a whole, applies where a witness sets out to adduce in chief evidence revealing the commission of criminal offences other than the one charged. A criminal defendant might wish to present an alibi, the full details of which would reveal the commission of another crime. A civil defendant might wish to prove the extent of past earnings, being earnings derived from criminal conduct. This raises a question whether witnesses who are eager to reveal some criminal conduct in chief, because it is thought the sting will be removed under sympathetic handling from their own counsel or for some other reason, are to be treated in the same way as witnesses who, after objection based on genuine reluctance, give evidence in cross-examination about some crime connected with the facts about which evidence is given in chief.

[112] The view that the accused’s claim of privilege in all the circumstances answered the requirements of s 128(1) has difficulties. It strains the word ‘objects’ in s 128(1). It also strains the word ‘require’ in s 128(5) – for how can it be said that a defendant-witness is being ‘required’ to give some evidence when his counsel

¹⁰⁶ Per Gleeson CJ, Gummow, Heydon and Crennan JJ At [106]-[113].

has laid the ground for manoeuvres to ensure that the defendant-witness's desire to give the evidence is fulfilled? And it does not fit well with the history of s 128(8). For one thing, s 1(e) of the 1898 Act and its Australian equivalents provided that an accused person called pursuant to the legislation could be 'asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged, which implies that the protection of the accused's position in chief or in re-examination was a matter between the witness's counsel and the witness. For another thing, the Australian Law Reform Commission, in summarising the pre-s 128(8) law, assumed that s 1(e) and its Australian equivalents were to be construed as applying to questions in cross-examination only.'

108 The High Court did not need to decide this issue as it was not raised by the Crown in proceedings below or in the proceedings in the High Court, and the appeal was allowed on other grounds. However, the court noted that the question could be of considerable importance in the day-to-day conduct of trials as counsel for the accused submitted that in practice s 128 was often employed by prosecutors to elicit evidence in chief.

F. Affidavits

109 It is important for every practitioner to be aware of, and comply with, the rules of court that govern the content, form and service of affidavits. It is not within the scope of this paper to explore those rules in any detail, but I wish to address two issues as to the form and content of affidavits.

110 It was never a rule of evidence, as distinct from a rule of practice more often honoured in the breach than in the observance, that evidence of conversations had to be in direct speech.¹⁰⁷

¹⁰⁷ See *Commonwealth v Riley* (1984) 5 FCR 8 at 34.

111 The issue was considered by Barrett J in *LMI Australasia Pty Ltd v Baulderstone Hornibrook Pty Ltd* [2001] NSWSC 688; (2001) 53 NSLWR 31. In *LMI Australia*, the plaintiffs objected to the form of a passage in a witness statement that the defendants proposed to tender, which recorded in indirect speech a conversation to which the witness was a party. The passage began, *“Although I cannot remember the specific terms of the conversation that I had with McGee at the time, in substance I told him that I stated that the consortium was prepared to negotiate along the following lines”*, followed by paragraphs setting out those *“following lines”*. Barrett J stated (at [8]):

“There is no rule of law, whether under the Evidence Act or otherwise, which makes inadmissible evidence of a conversation given in indirect speech, but there are obviously very good reasons why courts have, over the years, been astute to regard the direct speech form as the best form. The statements in the two Queensland cases to which Mr Campbell took me [R v Wright (1985) 19 A Crim R 17 and R v Noble (2000) 117 A Crim R 541] share a common thread of the witness's inability to remember the precise words used. In each of the passages I have quoted there is a statement that the witness was unable to remember the precise words. Obviously if a witness can remember them, evidence should be given of the ipsissima verba [the very words].”

112 Justice Barrett also observed (at [9]) that there is a real possibility of invoking s 135 where evidence of a conversation is given in indirect speech. The question would be whether there is unfair prejudice operating against the opposing party because of a curtailment of the ability to cross-examine and the potential for the probative value of the evidence to be diminished by its form. That would be so if the conversation in question had an important role in the proceedings, which was that case in *LMI Australia*. Justice Barrett said that in the circumstances, the desirable course was to give leave to the defendants to adduce oral evidence from

the witness on the matter covered by the statement to which objection was taken, although this was not something that should invariably be done where an affidavit or witness statement reports a conversation in indirect speech (at [11]). (Where that is done, the usual result is that the evidence is given orally in a form at least as dubious as the affidavit, but no objection is taken.)

113 A further issue regarding affidavits is the implications arising where a party adduces affidavits which are sworn or affirmed by different witnesses but the whole or substantial part of the affidavits are essentially identical.

114 The identity of affidavits may evidence collusion. However, unless an order is sought and obtained under s 135 of the *Evidence Act* to exclude the evidence, the identity of affidavits does not necessarily mean the evidence is inadmissible. It simply casts a cloud over the credibility of the witnesses and thus diminishes the weight to be accorded to their evidence. The outcome depends on the circumstances in which the identity arises.

115 In *Rosebanner Pty Limited v EnergyAustralia* [2009] NSWSC 43, Ward J considered the similarity of language used in two affidavits sworn by two witnesses, a client and his solicitor. The parts of the affidavits in question recounted a critical part of a meeting at which the witnesses had been present, and what was said at the meeting had significance for the issues in dispute. The affidavits used the same formal template, but Ward J did not draw any significance from this, noting that it could have been a matter of clerical convenience (at [322]-[323]).

116 Her Honour was concerned with evidence that the two witnesses clearly conferred in relation to the preparation of part of the client's affidavit. The circumstances in which the affidavits were prepared were unfortunate.

The solicitor had prepared his own affidavit, as well as the affidavit of his client. The solicitor was not only a senior practitioner but also a witness to the events the subject of the conversation to which his client deposed, and should have known of the dangers of his approach. The difficulties of this course of action were highlighted when part of the client's sworn affidavit evidence was contradicted by his oral testimony given at the hearing on the same issue. Her Honour was rightly critical of the manner in which the affidavits had been prepared (at [325]).

117 Her Honour that (at [326]):

"I am mindful that where there are in evidence substantially identical affidavits this may give rise to an inference of collusion between witnesses, which inference in turn may diminish the weight or credit accorded to the evidence of those witnesses."

118 In light of the manner in which the affidavits were prepared, her Honour considered it appropriate to attribute less weight to the evidence of these witnesses (at [334]).

119 Quite apart from the problem of identical words, it should be obvious that a solicitor who is a witness should not prepare an affidavit for another witness to the same facts.

120 In the course of her reasons, Ward J referred to *Macquarie Developments Pty Limited v Forrester* [2005] NSWSC 674, in which Palmer J considered the weight to be attributed to two affidavits dealing with critical discussions in virtually identical terms in circumstances where the evidence was that the solicitor who prepared the affidavits had "copied and pasted" portions from each. His Honour stated:

“[89] Clearly, the Defendants’ solicitor failed to appreciate that the evidence of each witness must be in the words of that witness and that it is totally destructive of the utility of evidence by affidavit if a solicitor or anyone else attempts to express a witness’ evidence in words that are not truly and literally his or her own.

[90] Save in the case of proving formal or non-contentious matters, affidavit evidence of a witness which is in the same words as affidavit evidence of another witness is highly suggestive either of collusion between the witnesses or that the person drafting the affidavit has not used the actual words of one or both of the deponents. Both possibilities seriously prejudice the value of the evidence and Counsel usually attacks the credit of such witnesses, with good reason.

[91] Where the identity of evidence is due to collusion, the devaluation of the evidence is justified but where, as in the present case, the identity of evidence is due entirely to a mistake on the part of a legal adviser, a witness’ credit and a party’s case may be unjustly damaged.”

121 However, in contrast to *Rosebanner*, the solicitor in this case was young and relatively inexperienced and did not prepare the affidavits under the supervision of a senior solicitor of his firm. The solicitor gave evidence, which his Honour accepted, that he interviewed each of the witnesses separately and took down their statements as to the critical discussions. He did not show the draft of the affidavit of one witness to the other witness. However he decided to “cut and paste” the portions of the affidavit because he noticed that the evidence from both witnesses were very much to the same effect, although not identical. He said that the mistake was an honest one. Palmer J said that this evidence “*entirely removed any suspicion that there has been collusion on the part of [the witnesses] in the preparation of their affidavit evidence*” (at [92]).

122 A similar issue arises where Witness A swears or affirms an affidavit that simply states that he or she he has read the affidavit of Witness B, and agrees with and adopts that affidavit. In this situation, even though there may not necessarily be any collusion in the sense described in *Rosebanner*, Witness A is not, strictly speaking, giving evidence in his or her own words, and, in the words of Palmer J in *Macquarie Developments*, it is “totally destructive of the utility of evidence.” The “evidence” is not truly independent evidence. It would be doubtful that the views expressed by Witness A in his or her affidavit testimony represented his or her independent views uninfluenced by the views or recollection of Witness B. In this situation, it would be open to the court to accord less weight to Witness A’s evidence, particularly where the affidavit evidence go to important issues in dispute.

G. Conclusion

123 I conclude this paper with a final observation on the *Evidence Act*.

124 Professor Thayer observed that:

“A system of evidence like ours, thus worked out at the forge of daily experience in the trial of causes, not created, or greatly changed, until lately, by legislation, not the fruit of any man’s systematic reflection or forecast, is sure to exhibit at every step the marks of its origin. It is not concerned with nice definitions, or the exacter academic operations of the logical faculty. It is attending to practical ends. Its rules originate in the instinctive suggestions of good sense, legal experience, and a sound practical understanding; and they are seeking to determine, not what is or is not, in its nature, probative, but rather, passing by that inquiry, what, among really probative matters, shall, nevertheless, for this or that practical reason, be excluded, and not even heard by the jury.”¹⁰⁸

125 History has left its indelible stamp on the *Evidence Act*. Modern-day litigation involves far fewer trials before a jury than when the rules on

¹⁰⁸ See *Thayer’s Treatise on Evidence* at 3-4.

admissibility were being developed.¹⁰⁹ The disappearance of many jury trials has abated the historical need for visible and transparent rules on admissibility to manage the distrust of the jury's ability to disregard unreliable evidence.

126 Logically, the question must be asked whether we must still contend with such a large volume of rules on admissibility. Outside criminal trials and limited civil proceedings, what purposes do all those rules serve today?

127 To an extent, the *Evidence Act* recognises this lessened need to regulate the court's search for "truth." Under s 190, the court can waive the bulk of the rules of admissibility contained in the Act in both civil and criminal trials if certain conditions are met, which leaves it up to the court to accord appropriate weight to the evidence that has been admitted.

128 One would think that if Bentham were alive today, he would approve of this feature of the *Evidence Act*. About two centuries ago, he propounded a theorem to underpin the law of evidence: that the court should hear everyone and admit everything unless the evidence is not relevant or causes vexation, expense and delay.¹¹⁰ In practice, in civil trials without a jury, we have moved remarkably close to this.

129 Section 190 would have also pleased Wigmore, who lamented the shortcomings of the judicial habit of enforcing a rule of evidence regardless of whether there was any dispute as to the need for enforcing it, and said:

¹⁰⁹ In the Supreme Court, proceedings are not to be tried by a jury unless the court orders otherwise where a party applies for a trial by jury and the court is satisfied that the interests of justice require it (*Supreme Court Act 1970 (NSW)*, s 85). The exception is defamation proceedings, which are tried before a jury. In the Federal Court, civil proceedings are conducted without a jury unless the Court or a Judge otherwise orders (*Federal Court of Australia Act 1976 (Cth)*, s 39).

¹¹⁰ See *Rationale of Judicial Evidence* at 1.

“What is wanted is a principle something like this: A rule of Evidence need not be enforced, if the Court, on inquiry of counsel or otherwise, finds that there is no bona fide dispute between the parties as to the fact which the offered Evidence tends to prove, or that the danger against which the rule aims to safeguard does not exist for the case in hand. Such a principle, faithfully observed by judges, would clear the air of much of the legal malaria now caused by the rules of Evidence.”¹¹¹

- 130 At least in civil proceedings, s 190 should allow the courts to discharge their duty under s 56 of the *Civil Procedure Act* to give effect to the overriding purpose of facilitating the “just, quick and cheap resolution of the real issues in the proceedings” in its search for “truth.”

¹¹¹ *Wigmore on Evidence* at 248-249