

Books

UNIFORM EVIDENCE by Jeremy Gans and Andrew Palmer (2010)
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It has been over 15 years since the uniform evidence legislation commenced in Australian jurisdictions. The Commonwealth of Australia was the first to enact it in 1995, followed months later by New South Wales (NSW). Tasmania adopted it in 2001, then Norfolk Island in 2004 and significantly it commenced in Victoria in 2010.¹ The uniform *Evidence Act* regime was the result of the Australian Law Reform Commission's ('ALRC') inquiry into the law of evidence, following its receipt of Terms of Reference in 1979, which produced an interim and final report that contained draft legislation.² The uniform evidence legislation was the subject of a second ALRC inquiry which examined the legislation's performance during ten years of its operation and recommended amendment.³ The amendments recommended by the ALRC sought to correct problems in the legislation (for example, early in the statute's life a frequently litigated question was whether the privilege provisions applied to pre-trial applications;⁴ another issue involved the application of the test for competency to give sworn and unsworn testimony),⁵ and the amendments also sought to reverse some of the High Court's interpretation of various provisions (for example, the credibility rule⁶ and the hearsay rule).⁷ The ALRC recommendations have now been enacted.⁸

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¹ It was enacted in Victoria in 2008 and commenced on 1 January 2010: *Evidence Act 2008* (Vic). The other uniform evidence statutes are: *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW); *Evidence Act 2001* (Tas); and *Evidence Act 2004* (NI).

² Australian Law Reform Commission, *Evidence*, Interim Report No 26 (1985); Australian Law Reform Commission, *Evidence*, Report No 38 (1987).

³ Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, Report No 102 (2005).

⁴ This was an issue that received early attention and resulted in the reformulation of the common law: *Esso Australia Resources v Federal Commissioner of Taxation* (1999) 201 CLR 49. The ALRC raised the option of inserting a provision that made it clear that the privileges in the uniform evidence legislation apply to pre-trial proceedings: Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, above n 3, 464–5 [14.39]–[14.41]. Section 131A of the uniform evidence legislation does that, however s 131A has been held to have limited application in respect of the State: *State of New South Wales v Public Transport Ticketing Corporation* [2011] NSWCA 60 (23 March 2011), [34]–[40] (Allsop P).

⁵ The amendments to s 13 have redefined the test for competency to give sworn and unsworn evidence: Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, above n 3, 96–115 [4.3]–[4.89]. Section 13 was incorrectly applied by trial judges, most notably in *R v RAG* [2006] NSWCCA 343 (26 October 2006) and *R v Brooks* (1998) 44 NSWLR 121.

⁶ The amendment of s 102 in the uniform evidence legislation and the enactment of s 101A reversed the decision of *Adam v The Queen* (2001) 207 CLR 96: Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, above n 3, 394–8 [12.5]–[12.19].

This history of significant evidence law reform was made with the ultimate goal of Australia having a unified evidence regime, which has not yet occurred. However, the uniform evidence legislation has made major changes to the law of evidence, most significantly in the areas of hearsay, credibility, similar fact evidence and discretionary exclusion of evidence. The legislation's major appeal is its simplicity and accessibility. Since the uniform evidence legislation's enactment, a substantial body of law has developed on its interpretation. Victoria has now entered into this development. *Uniform Evidence*⁹ is a welcome addition to the body of material devoted to understanding evidence law in uniform evidence legislation jurisdictions.

Jeremy Gans and Andrew Palmer are two leading authorities in evidence scholarship, both domestically and internationally. Both are highly respected academics at Melbourne Law School—Palmer is also a practising barrister at the Victorian Bar—who have researched and taught evidence for many years. Palmer has twice acted as a consultant to the Victorian Parliament on inquiries into the law of evidence. Gans also specialises in human rights and was appointed as the Human Rights Adviser to the Victorian Parliament's Scrutiny of Acts and Regulations Committee. In addition to their research, they have revolutionised the model for teaching evidence at Melbourne Law School. They are perfectly qualified to add to the scholarship on the uniform scheme.

Uniform Evidence follows on from the authors' previous work, *Principles of Evidence Law*,¹⁰ however *Uniform Evidence*—as its name suggests—focuses on the statute. While the authors' earlier book sought to explain the position under both the common law and the uniform evidence law, their new work makes a sharp departure from that approach and only covers the law that applies to jurisdictions that have adopted the uniform scheme. However, the book is not silent on the common law; it refers to it to explain the legislation where relevant. The strength of the book is that the authors embrace the legislation and do not make the common mistake of explaining the statute in the prism of the common law. For example, the authors deal with the inferences from an accused's silence at trial with adducing evidence, rather than the traditional common law placement—which is to position this topic in proof. The book cannot be solely relied on in those jurisdictions that are not part of the uniform scheme. Therefore, the ability to use this book provides yet another reason for those reluctant jurisdictions to take the plunge and enact the statute so that Australia can truly have a uniform scheme.

The beauty of the book is the easy conversational style with which the authors explain the complexities of the legislation. The book is structured in a way

⁷ The amendment of s 60 in the uniform evidence legislation sought to overcome *Lee v The Queen* (1998) 195 CLR 594, so that s 60 applies to remote hearsay (but not to an admission in criminal proceedings): Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, above n 3, 214 [7.104]–[7.106]. Amendment of s 66 in the uniform evidence legislation overruled the strict temporal interpretation of 'fresh in the memory' in *Graham v The Queen* (1998) 195 CLR 606: Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, above n 3, 241–3, 255–6 [8.119]–[8.124].

⁸ *Evidence Amendment Act 2008* (Cth); *Evidence Amendment Act 2007* (NSW). The amendments commenced on 1 January 2009. The *Evidence Act 2008* (Vic) included the amendments.

⁹ Jeremy Gans and Andrew Palmer, *Uniform Evidence* (Oxford University Press, 2010).

¹⁰ Jeremy Gans and Andrew Palmer, *Australian Principles of Evidence* (Cavendish, 2nd ed, 2004).

conducive to readers easily understanding its content. Each chapter opens with a summarised introduction, explains the topic and concludes with a summary of the content of the chapter. The work uses examples to provide practical applications of the law. Students and practitioners alike will appreciate the flowcharts at the end of each chapter that analyse the statute by setting out the steps in the application of its provisions. While the book does not contain an extract of the entire legislation, it does reproduce provisions in the body of the text where necessary. Another strength of the authors' work is the consistent reference to overseas developments in the law of evidence, which are similar or in contrast to the uniform evidence law.

Chapter 1 provides a clear and useful introduction to the subject. The introduction describes the aims of evidence law with reference to the seminal work of Professor William Twining. An explanation is then given of the development of the uniform evidence legislation and the observation made that it has attained majority status in Australia in terms of jurisdictions—it is adopted in six out of the ten court systems—and by virtue of population—it reaches 61 per cent of the population.¹¹ The authors predict the 'complete extinction of the common law of evidence in the long run'.¹² Importantly, the chapter then places the uniform evidence legislation in the context of other laws: local statute law, common law, overseas law and human rights law. Chapter 1 provides an excellent explanation of a question that appears to confuse many students; namely the relationship between the statute and the common law. This chapter shows that the Australian developments in evidence law is a trend that has occurred in other common law countries that have sought to make evidence law 'fresher, simplified and unified'.¹³ In addition, this chapter raises the possibility that the Victorian development of the legislation may diminish the uniformity of the scheme due to the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('Victorian Charter'). An interesting future development for Victoria will be the interaction between the *Evidence Act 2008* (Vic) and the Victorian Charter. The interaction between evidence and human rights has been the subject of much litigation in the United Kingdom; the *Human Rights Act 1998* (UK) incorporated the *European Convention on Human Rights* ('ECHR') into English law, so that individual rights conferred by the ECHR are directly enforceable in proceedings before the English courts. This has meant that English legislation dealing with evidence has come under scrutiny for its compatibility with a defendant's right to a fair trial under Article 6 of the ECHR. This interaction has also been a source of litigation in other common law countries such as Canada, the United States of America, New Zealand and South Africa, and provides an interesting area of evidence scholarship which is sadly missing from jurisdictions without a human rights instrument.

The book is divided into three parts: 'adducing evidence', 'admissibility' and 'proof'. This structure is logical as it reflects the form of the uniform evidence legislation. Part one deals with 'adducing evidence' and sets out the main issues, however coverage of some of the issues which have troubled NSW appellate benches could be useful to understand the provisions; for example, the ambit of cross examination in circumstances where a witness is declared unfavourable,¹⁴ or

¹¹ Gans and Palmer, above n 9, 1.

¹² Ibid 2.

¹³ Ibid 19.

¹⁴ See *R v Hogan* [2001] NSWCCA 292 (3 August 2001); *R v Le* (2002) 54 NSWLR 474.

the misapplication of the competency provisions to child witnesses in child sexual assault trials.¹⁵ The explanation of reviving memory is particularly good, with an excellent practical example to illustrate the operation of the statute.

Part two deals with ‘admissibility’. Chapter 4, on ‘relevance’, clearly sets out the important questions that need to be considered to satisfy the test of relevance. The method of assessing relevance has benefited greatly from McHugh J’s observations in *Papakosmas v The Queen*, where His Honour clarified that in assessing relevance a judge assumes that the evidence is reliable.¹⁶ These observations are neatly explained in this chapter. The chapter also provides a brilliant illustration—from a case—of the difference between direct and circumstantial evidence. Further, the chapter uses examples from High Court cases to provide the reader with a greater understanding of the fundamental requirement that an item of evidence must be capable of rationally affecting the ‘assessment of the probability of the existence of a fact in issue in the proceeding’.

Chapters 5 and 6 deal with the ‘hearsay rule’ and its exceptions. Chapter 5 introduces the hearsay rule and provides a good foundation for the reader to understand the rationale and importance of the rule. The scope of the rule is explained with commanding clarity that promotes a solid understanding of this complex rule. The chapter benefits from the frequent use of case examples to illustrate the relevance of evidence for hearsay and non-hearsay uses. The examples cited to explain the non-hearsay use of a previous representation are particularly helpful. In addition, the authors’ explanation of the requirement of intention in the hearsay rule—and the subsequent amendments to that definition—is skilfully done by using the facts of *R v Hannes*.¹⁷ Chapter 6 aims to explain the myriad of exceptions to the hearsay rule. Again, the authors’ demonstrate their grasp of the law and beautifully explain the requirements of the exceptions together with well placed illustrations from cases. The chapter also notes that the development of hearsay exceptions in Victoria may be affected by the Victorian Charter, namely the right to a fair hearing and the right to examine prosecution witnesses. The significant US and UK cases are cited.¹⁸ However perhaps more analysis on this topic would be useful together with a prediction of future developments in Victoria. Again, the flowcharts in these chapters will be of great benefit to readers.

Chapter 7 covers the ‘opinion rule’ and its exceptions. All the important issues in relation to this area of law are covered in this chapter; however the structure of the material on expert evidence could reflect the structure of the legislation more closely. The chapter explains that the three fundamental aspects of expert evidence are: subject matter; foundational facts; and communication. However, keeping in line with the structure of the book—which relies on the statute—it may be more helpful to use the language of the statute so that the three fundamental factors are: specialised knowledge; qualification; and the requirement that the opinion be based on the specialised knowledge. In addition, perhaps more attention could be given to how the court assesses, if at all, novel areas of expert

¹⁵ See *R v RAG* [2006] NSWCCA 343 292 (26 October 2006); *R v Brooks* (1998) 44 NSWLR 121.

¹⁶ *Papakosmas v The Queen* (1999) 196 CLR 297, 321 [81] (McHugh J), which was approved in *Adam v The Queen* (2001) 207 CLR 96, 105 [22] (Gleeson CJ, McHugh, Kirby and Hayne JJ).

¹⁷ (2000) 158 FLR 359.

¹⁸ *Crawford v Washington* 541 US 36 (2004); *Al-Khawaja & Tahery v United Kingdom* (2009) 49 EHRR 1.

evidence. Case law under the uniform evidence legislation is yet to provide a clear test for the method to determine whether a ‘specialised knowledge’ is acceptable to a court (this is in contrast to the US position).¹⁹ This chapter raises the issue of whether the requirement for an expert to ‘furnish the trier of fact with criteria enabling evaluation of the validity of the expert’s conclusions’²⁰ is necessary for admissibility of the opinion or whether it is relevant to the weight given to the opinion.²¹ The authors provide forceful reasons for why they doubt that Heydon JA’s (as he then was) requirement in *Makita (Australia) Pty Ltd v Sprowles* operates as a rule of admissibility.²² This issue could be resolved shortly as it has been the subject of a recent grant of special leave by the High Court.²³

Chapter 8 deals with ‘admissions’. Again, the legislation is illuminated with excellent examples from case law, most notably the unreliable confession in *Mallard v The Queen*²⁴ and the use of international cases such as *Ireland v United Kingdom*,²⁵ where the European Court of Human Rights held that the practices used to interrogate terrorist suspects were inhuman and in breach of the ECHR. This case is juxtaposed with the NSW defamation case of *Habib v Nationwide News Pty Ltd* where the primary judge did not exclude admissions obtained while Mr Habib was in detention in Islamabad and Guantanamo Bay.²⁶ This chapter also gives a clear explanation of *Em v The Queen*.²⁷

Chapter 10 discusses ‘tendency and coincidence evidence’, and needs to be read with chapter 12 on ‘character’ of the accused. Chapter 12 covers tendency and coincidence evidence of the accused in the chapter that deals with ‘character’ of the accused. Perhaps tendency and/or coincidence evidence about the accused is better dealt with in chapter 10 (this follows the structure of the legislation). Further, not all similar fact evidence (about the accused) is relevant to the character of the accused and so does not strictly fit into a chapter on ‘character’. For example, the finding of the 12 babies’ bodies in the Makin’s backyards was relevant to show that baby Horace’s body which was located in one of the Makin’s backyards was not an accidental death. The coincidence evidence was not relevant to prove character but rather it proved the improbability of the accidental death of baby Horace.²⁸ However, this geographical comment should not detract from the fact that chapters 10 and 12 provide an excellent understanding of the statute.

Chapter 16, which covers ‘discretions to exclude evidence’, deals with one of the contentious issues in the uniform scheme which is ripe for High Court

¹⁹ See *Daubert v Merrell Dow Pharmaceuticals Inc* [1993] USSC 114; 509 US 579 (1993) which set guidelines for the court’s application of the expert evidence provision in the US Federal Rules of Evidence (Rule 702 Testimony by Experts).

²⁰ *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, 729 [59]; see 743 [85] (Heydon JA).

²¹ *Sydneywide Distributors Pty Limited v Red Bull Australia Pty Ltd* (2002) 55 IPR 354, 359 [16] (Branson J).

²² Gans and Palmer, above n 9, 148.

²³ Transcript of Proceedings, *Dasreef Pty Limited v Hawchar* [2010] HCATrans 339 (10 December 2010). Listed for hearing on 6 April 2011.

²⁴ (2003) 28 WAR 1, revd *Mallard v The Queen* (2005) 224 CLR 125.

²⁵ (1978) 25 Eur Court HR (ser A).

²⁶ [2008] NSWSC 181. The Court of Appeal subsequently reversed this decision and found that the primary judge erred in concluding that the admissions were admissible; *Habib v Nationwide News Pty Ltd* [2010] NSWCA 34 (16 March 2010).

²⁷ (2007) 232 CLR 67.

²⁸ *Makin v Attorney-General (NSW)* [1894] AC 57.

development; how does a judge assess the ‘probative value’ of evidence for the purpose of applying judicial discretion to exclude the evidence? Two approaches to this question are found in comments made by McHugh J and Gaudron J. Justice McHugh has contrasted the legislation’s dictionary definition of ‘probative value’ with the definition of relevance (in s 55) in that it does not contain the qualification ‘if it were accepted’ and McHugh J stated (as *dicta* only), that an assessment of ‘probative value’ of evidence involves considerations of reliability.²⁹ Justice McHugh’s view is consistent with the ALRC’s report.³⁰ However, in a subsequent High Court case, Gaudron J expressed a different view: that the omission of the words ‘if it were accepted’ from the definition of ‘probative value’ is of ‘no significance’. Her Honour observed that she would read the term into the dictionary definition of ‘probative value’.³¹ The law in NSW is consistent with Gaudron J’s view. The NSW position is that a judge does not consider the reliability and/or credibility of the evidence in assessing its probative value, but rather accepts the probative value as contended by the party seeking to admit the evidence (competing inferences/explanations of the evidence are not taken into account and the evidence is taken at its highest).³² However, the Tasmanian position is in contrast to NSW, as reliability is taken into account by the judge when assessing the probative value of evidence.³³ The authors quite rightly state, in reference to the NSW decisions,³⁴ that:

[T]his attempt to reconcile the competing views of Gaudron and McHugh JJ is doomed by its conceptual confusion: either issues of reliability and credibility are relevant to the assessment of probative value or they are not. They can not only be relevant in the extreme case where the evidence is entirely unreliable or completely lacking in credibility.³⁵

The authors prefer the approach of McHugh J, which is also the approach that this author prefers.

The remaining chapters on ‘credibility’ (chapter 11), ‘identification’ (chapter 13), ‘privileges’ (chapters 14–15), ‘proof’ (chapters 17–19) and ‘ancillary provisions’ (chapter 20), follow the characteristic style of this book; that is by providing good explanations with practical illustrations from case law.

Uniform Evidence is written by two brilliant evidence minds and provides a much needed addition to uniform evidence law scholarship. The clear writing is fresh and interesting for all levels of evidence scholars. This author looks forward to reading the second edition which will no doubt be longer, as it will include Victoria’s interpretation of the legislation.

²⁹ *Papakosmas v The Queen* (1999) 196 CLR 297, 323 [86] (McHugh J),

³⁰ *Evidence (Final Report)*, above n 2 [146].

³¹ *Adam v The Queen* (2001) 207 CLR 96, 115 at [60], Gaudron J dissented in this case (the majority judgment did not deal with this issue).

³² *R v Sood* [2007] NSWCCA 214 (19 July 2007). See also *R v Shamouil* (2006) 66 NSWLR 228; *R v Mundine* [2008] NSWCCA 55 (18 March 2008).

³³ *DPP (Tas) v Lynch* (2006) 16 Tas R 49.

³⁴ *R v Shamouil* (2006) 66 NSWLR 228; *R v Mundine* [2008] NSWCCA 55 (18 March 2008).

³⁵ Gans and Palmer, above n 9, 317.