Review of Archie Zariski (ed), *Evidence and Procedure in a Federation*, Sydney: Law Book Company, 1993. pp i-xxv, 1-231. HC $65.00.

This book is a record of the proceedings at a conference which the Australian Institute of Judicial Administration and the Law Council of Australia sponsored on 9 and 10 April 1992 in Melbourne. It is broadly divided into two sections dealing with evidence and discovery.

Evidence

As the title indicates, the book emphasises the issues about evidence and discovery that are important in a Federation. Since its creation in 1976, the Federal Court's jurisdiction has steadily increased. It exercises jurisdiction under Commonwealth legislation but the associated jurisdiction means that it can deal with matters that would otherwise come within State Supreme Court jurisdiction. The cross-vesting scheme will further increase its jurisdiction. Clearly, therefore, a coherent system of evidence and procedure has to apply to the Federal Court (indeed to Federal jurisdiction generally) irrespective of whether that jurisdiction is exercised in the Federal Court or in a State Court pursuant to Federal law. There is a quaint provision in section 79 of the Judiciary Act 1903 (Cth) that State law of evidence and procedure applies to a court exercising Federal jurisdiction. Consequently, the Federal Court applies the rules of evidence of the State where it happens to be sitting. Similarly, where a State Court exercises Federal jurisdiction, it applies the rules of evidence applicable in that State.

This is of no moment in procedure. All courts have comprehensive rules of procedure. It is of concern in evidence. There is no uniform law of evidence. With the ever increasing volume of Commonwealth legislation conferring powers on the Federal Court there is a need for a uniform law of evidence to govern Federal proceedings. The Australian Law Reform Commission in its report on *Evidence* (No 38, Canberra, 1987) provides a draft Bill. At pp 42–45 of the conference proceedings Doyle criticises some sections of the Bill as not being an improvement on the common law. It lacks flexibility. However, it is submitted that this is beside the point. For certainty and convenience there ought to be a definite set of rules of evidence governing Federal proceedings. Whether a statute is inferior to the common law is immaterial. This in part is the point Jackson makes at p 12. The legal profession is taking on a more national attitude. Many of the larger firms of solicitors are national rather then State partnerships. Even litigation in which State law applies crosses State boundaries. The cross-vesting scheme preserves all the Federal, State and Territory jurisdictions. With this diversity it is important to achieve as much uniformity in evidence and procedure as possible. This is surely relevant to the policy of the High Court decision in *Breavington v Godleman* (1989) 169 CLR 41 and the New South Wales Court of Appeal decision in *Beecham (Aust) Pty Ltd v Roque Pty Ltd* (1987) 11 NSWLR 1.

The debate about a uniform law of evidence identifies an important issue. It

would be a pity if it had to be decided according to the politics of States' rights and centralism. There is a further point. It is undesirable to juxtapose constitutional and federal issues such as Federal Court jurisdiction and cross-vesting with the law of evidence. Certainly they are related. But our habit of pushing aside procedure in favour of what we regard as substantive law means that procedure, including evidence, receives far too little attention. Juxtaposing constitutional law with evidence and procedure usually means that constitutional law wins. The occasion under review was an exception.

Emmerson presented the conference with a paper about proving electronically stored data (pp 72–81). It repays careful study in highlighting the issues associated with proving computer generated information. Computer generated information must be distinguished from information which a computer merely stores and reproduces without alteration or addition. A computer generates information when it manipulates information according to a program and produces new information. Information entered into a computer is thus altered or enhanced. It is not reproduced in its original form. It is not valid to equate information of this nature with a document. Conversely, information that a computer reproduces in its original form can be equated to a document. Information of this latter kind can be proved in the same way as a document.

The Australian Law Reform Commission's draft Bill equates electronically stored information with a document and applies the hearsay rule to it. There are exceptions for business records. The draft Bill provides that computer produced records are admissible. If the tendering party asserts that a computer performed a process, the result the party asserts was achieved is taken to be the result actually achieved. This, Emmerson points out, does not necessarily follow. As mentioned, there is no analogy between information generated in a computer and a written document. The Australian Law Reform Commission's proposal is to exclude information unless the conditions for admissibility are established.

There is no easy solution to the problems posed by the admission into evidence of electronically produced information. Emmerson's only suggestion is that the court should decide each case individually rather than apply a general rule of evidence (p 80). It would consider the type of technology involved, the reliability of the data, the ease with which the data could be changed, the likelihood of its being changed and the traps in the operation of the machine. This is flexible but it also makes admissibility uncertain.

Discovery

Most of the contributions on discovery of documents emphasise the problems caused by voluminous discovery. It is a two stage procedure. First, each party prepares an affidavit listing all relevant documents. Secondly, the parties inspect each other's unprivileged documents. There may be weight in Branson's suggestion that discovery should first emphasise inspection rather than the drawing up of a list (p 118). Still, the possible convenience of merely producing documents for inspection does not relate to the guidelines for selecting discoverable documents.

White J examined existing discovery practices. Under the rules the parties must list all documents in their possession, custody or power which relate to a "matter in question". Pleadings determine whether a matter is in question. Pleadings often fail

to define the issues accurately. The plaintiff formulates a statement of claim so widely and encompasses so many causes of action that the substantive cause of complaint is lost. Similarly, the defendant puts forward a total denial of all the plaintiff's allegations. Even formal admissions are sometimes withheld. A huge volume of documents come within the formula "matters in question" (p 138). White J considered that the courts should mould orders for discovery to allow discovery of necessary documents only (p 135). The question is how discovery can be kept under control.

Manousaridis thought that wide discovery enhanced proper preparation and investigation of facts and ought not be restricted (p 174). Marks J, on the other hand, thought greater court control was essential. There should be no automatic right to discovery. Rather, the court should supervise litigation through regular directions hearings (pp 132–133). Major interlocutory procedures such as discovery and interrogatories should be allowed only if the list judge or master is persuaded of the need.

Discovery is not the only means of obtaining information from an opponent, as French J pointed out in his paper concerning the return of subpoenas before the trial. He discusses the proper function of a subpoena and includes an interesting section on using it to get discovery from a person who is not party to the proceedings. This is said to be an improper use of a subpoena (p 156).

The contributions also examine the compulsory disclosure of documents under section 155 of the Trade Practices Act 1974 (Cth), the investigatory powers of the Australian Securities Commission and the obligation of disclosure imposed by sections 263 & 264 of the Income Tax Assessment Act 1936 (Cth).

This book is a thorough assessment of the issues posed by handling large amounts of information in complex litigation. Its title could indicate that it is confined to Federal issues. In truth the issues it raises apply equally to State jurisdiction. Those interested in law reform will find many practical suggestions. Beyond this, practitioners will be interested in the summary of existing law and practice, and students of civil procedure will see how the rules of procedure affect the conduct of litigation.

B C CAIRNS

Associate Professor, The University of Queensland.

Review of Nicholas J Mullany & Peter R Handford, *Tort Liability for Psychiatric Damage*, Sydney: Law Book Company, 1993. pp i-lv, 1-383. HC $95.00.

The law relating to nervous shock (or "psychiatric damage" as the authors call it) abounds in uncertainties and absurdities. The very definition of the damage in issue is problematic because, as the authors point out, the types of mental state most commonly in issue in the litigated cases are simply extreme versions of normal reactions to external events and stimuli. In order to restrict the scope of liability for mental injury, the courts draw some truly bizarre distinctions. Shock victims are distinguished according to the intensity of their love and affection for the primary victim; indeed the House of Lords in England has gone so far as to divide relationships into those which raise a presumption of sufficient ties of affection and those which do not. Shock-inducing events are distinguished according to whether they are sudden and traumatic or long-term and debilitating, so that a person who witnesses a car accident may recover, but a person who cares for a horribly injured victim for years without having been at the crash scene may not. It is discouraging, to say the least, to find judges concluding from use of the term "nervous shock" that the cause of the injury needs to be a "shocking" assault on the senses (p 192). The courts distinguish between different media of perception ("unaided senses", TV, bad news, and so on) in an admittedly arbitrary way. Also relevant is how far from the accident scene the shock victim was; and how long the period was between the primary victim's "accident" and the secondary victim's shock (so that the bigger the disaster and the greater the confusion and delay it generates, the less likely it is that victims of consequential shock will recover).

The courts' attempts to stem the flow of nervous shock claims (never, it seems, very great) are unlikely to be easily understood by ordinary people, let alone to be attractive to them. Several reactions are possible. One (that of the authors of this book) is to advocate expansion of liability for psychiatric damage by removing the "artificial" limitations imposed by the courts on such liability and resting liability for injury to the mind on the same foundations as liability for injury to the body. Another (which, to my knowledge, has been seriously expressed only by Jane Stapleton in a paper delivered to a seminar organised by the Society of Public Teachers of Law in Oxford in July 1993) is to support abolition of liability for injury to the mind standing alone. A middle way (canvassed but summarily rejected by Mullany & Handford, p 102) would be to suggest abolition of liability to "secondary victims" of mental injury. It is possible, I think, to mount more or less powerful arguments in favour of each of these positions; and they are all arguably preferable to the present state of the law. But each may be thought still to involve an element of arbitrariness; and at the end of the day (as so often happens when one digs beneath legal rules to uncover the value-judgments which underpin them), personal predilection might be the only basis for choosing between them.

A major disappointment in reading Mullany & Handford's volume is that they never really argue for their preferred position, but simply assume that expansion of