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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

EVIDENCE BILL 1993

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Justice,  
the Honourable Duncan Kerr MP)





## EVIDENCE BILL 1993

### OUTLINE

This Bill will reform the law of evidence applying in the High Court, the Federal Court, the Family Court and the courts of the ACT. Some provisions of the Bill apply to proceedings in all Australian courts or to proceedings in courts exercising federal jurisdiction. The provisions relating to use of Commonwealth records as evidence, and State and Territorial public records, will also apply to proceedings in all Australian courts.

2. The Bill replaces the Evidence Bill 1991, introduced in the House of Representatives for comment on 15 October 1991.
3. Following a decision by State and Territory Attorneys-General giving in-principle support to substantially uniform evidence laws throughout Australia based on the Evidence Bill 1991 and an Evidence Bill introduced in the New South Wales Legislative Assembly on 23 March 1991, the Commonwealth and New South Wales have developed new Bills which have a common text, except for differences reflecting constitutional and technical considerations. Comments received on the 1991 Bills have been taken into account in preparation of the new Bills.
4. This Bill, like the 1991 Bills, is based substantially on the recommendations of the Law Reform Commission in its report on Evidence.
5. The *Evidence Act 1905* and the *State and Territorial Laws and Records Recognition Act 1901* are to be repealed by a separate Bill. Some provisions of those Acts are rendered unnecessary by general provisions of this Bill. Other provisions are re-enacted (with modifications) by the Bill.
6. Provision is made for the Bill to cease to have specific application to ACT courts. This will enable evidence legislation enacted by the ACT Legislative Assembly to apply in ACT courts and tribunals.

#### Financial Impact Statement

7. The Bill will permit significant savings in Commonwealth storage costs by enabling departments and statutory authorities to abandon storage of original documents, after their microfilming or transfer to other modern storage media.

## NOTES ON CLAUSES

### CHAPTER 1 - PRELIMINARY

#### PART 1.1 - FORMAL MATTERS

##### Clause 1: Short Title

8. This clause provides for the short title of the Act.

##### Clause 2: Commencement

9. Sections 1 to 3 and the Dictionary at the end of the Act are to commence on Royal Assent. The other provisions of the Act are to commence on a day or days to be fixed by Proclamation, or 1 January 1995, whichever is the earlier.

##### Clause 3: Definitions

10. This clause provides that expressions defined in the Dictionary have the meanings given in the Dictionary. It also provides that notes (which includes examples) do not form part of the Act.

#### PART 1.2 - APPLICATION OF THIS ACT

##### Clause 4: Courts and proceedings to which Act applies

11. This clause provides for the application of the Act (except for its provisions which apply in all courts or in courts exercising federal jurisdiction).

12. The Act applies in all proceedings in federal courts and, until a day to be fixed by Proclamation, in courts of the Australian Capital Territory. A Proclamation will enable evidence legislation enacted by the Australian Capital Territory Legislative Assembly to apply in ACT courts.

13. The parts of the Act which apply only in federal or ACT courts does not apply to:

- appeals from courts in which those parts of the Act do not apply; and
- a review of a decision or order of a magistrate (and any appeal from such a review) except a decision or order of an ACT magistrate before any Proclamation.

14. Thus, in those cases, the evidence law that applied in the original proceeding will apply.

Clause 5: Extended application of certain provisions

15. This clause provides for the provisions listed in the Table to apply in all proceedings in Australian courts.

Clause 6: Territories

16. This clause extends the Act to all the external Territories.

Clause 7: Act binds Crown

17. This clause provides that the Crown in all its capacities is bound by the Act.

Clause 8: Operation of other Acts etc.

18. This clause provides for certain other laws not to be affected by the Act. These other laws are -

other Commonwealth Acts (except sections 68, 79, 80 and 80A of the *Judiciary Act 1903*),

regulations under another Act in force when the Act receives Royal Assent, for so long thereafter as they are not amended;

the Corporations Law and the ASC Law; and

for so long as the whole Act applies in ACT courts, prescribed provisions of the ACT Evidence Act 1971, other ACT Acts and Ordinances (including Imperial and State Acts in force in the ACT) and ACT regulations in force when the Act commences for so long thereafter as they are not amended, are to prevail over the Act.

Clause 9: Effect of Act on other laws

19. The clause makes it clear that the Act does not affect the operation of State and Territory law, including the common law, in relation to certain matters.

Clause 10: Parliamentary privilege preserved

20. This clause preserves the operation of laws relating to the privileges of any Australian Parliament.

**Clause 11: General powers of a court**

21. This clause preserves the general powers of courts to control proceedings before them, except so far as the Act provides otherwise, either expressly or by necessary intendment.

**CHAPTER 2 - ADDUCING EVIDENCE**

**PART 2.1 - WITNESSES**

**Division 1 - Competence and compellability of witnesses**

**Clause 12: Competence and compellability**

22. This clause provides that, except as provided otherwise by the Act, everyone is a competent and compellable witness.

**Clause 13: Competence: lack of capacity**

23. This clause replaces existing law which requires that a witness understand the nature and consequences of an oath in order to be competent to give sworn evidence.

24. Instead it provides that a person is not competent to give sworn evidence if he or she is incapable of understanding that, in giving evidence, he or she is under an obligation to give truthful evidence. However, such a person is competent to give unsworn evidence:

- if the court is satisfied he or she understands the difference between the truth and a lie;
- the court tells the person that it is important to tell the truth; and
- the person indicates, by appropriate response, that he or she will not tell lies in the proceeding.

25. The clause also provides that a person is not competent to give evidence about a fact if:

- he or she is incapable of giving a rational reply to a question about the fact; or

except where the incapacity can be overcome, he or she is incapable of hearing or understanding, or of communicating a reply to, a question about the fact.

26. Competence is presumed unless the contrary is proved.

27. Evidence a witness has given does not become inadmissible merely because he or she dies or becomes incompetent before finishing giving the evidence.

Clause 14: Compellability: reduced capacity

28. This clause provides that a person is not compellable to give evidence on a particular matter if the person can not hear or understand, or communicate a reply to, questions on that matter without substantial cost or delay, and other adequate evidence has been or will be given on that matter.

Clause 15: Compellability: Sovereign and others

29. This clause provides that the Sovereign, the Governor-General, a State Governor, the Administrator of a Territory, a foreign sovereign and the Head of State of a foreign country are not compellable to give evidence.

30. It also provides that members of a House of any Australian Parliament are not compellable if attending to give evidence would interfere with their attendance at a sitting of that House, a joint sitting of that Parliament or a meeting of a committee of that House.

Clause 16: Competence and compellability: judges and jurors

31. This clause provides that judges are not competent to give evidence in the proceeding in which they are acting as judges. A juror in a proceeding is competent to give evidence in the proceeding about matters affecting conduct of the proceeding, but is not otherwise competent to give evidence in the proceeding.

32. The clause also provides that a person who is or was a judge in a proceeding is not compellable to give evidence about the proceeding unless the court gives leave.

Clause 17: Competence and compellability: defendants in criminal proceedings

33. This clause provides special rules of competence and compellability for the defendant in a criminal proceeding and any associated defendant.

34. An associated defendant is defined in the Dictionary as any person who is being prosecuted for an offence that arose in relation to the same events as those in relation to which the offence for which the defendant in the criminal proceeding is being prosecuted arose, or relates to, or is connected with, that offence.

35. A defendant is not competent to give evidence as a witness for the prosecution. An associated defendant is not compellable to give evidence for or against a defendant unless he or she is being tried separately.

**Clause 18: Compellability of spouses and others in criminal proceedings generally**

36. This clause provides that a person who is the spouse, de facto spouse, parent or child of a defendant in a criminal proceeding when he or she is called to give evidence may object to being required to give evidence, or to being required to give evidence for the prosecution of a communication between the person and the defendant.

37. A court which considers that a person may have a right to object under this clause must satisfy itself that the person is aware of the effect of the clause.

38. An objection will be upheld if the court finds that:

- there is a likelihood that harm would or might be caused to the person or to the relationship between the defendant and the person if the person gives the evidence; and
- the nature and extent of that harm outweighs the desirability of the evidence being given.

39. The clause further provides that the court must take into account a number of matters including the nature and gravity of the offence charged, and the substance and importance, and the weight likely to be attached to, any evidence the person might to give.

40. A prosecutor must not comment on an objection, the decision of the court in relation to the objection or the failure of the person to give evidence.

**Clause 19: Compellability of spouses and others in certain criminal proceedings**

41. This clause provides that clause 18 does not apply in proceedings for certain offences against children and domestic violence offences. As a result a spouse, de facto spouse, parent or child of a defendant must give evidence in such proceedings.



Clause 20: Comment on failure to give evidence

42. This clause applies only in a criminal proceeding for an indictable offence. The clause permits comment by the judge and a co-defendant on a failure by a defendant, his or her spouse or de facto spouse or a parent or child of a defendant to give evidence.

43. The comment, except when made by a co-defendant, must not suggest that the failure to give evidence was because the defendant was guilty of the offence, or the defendant, spouse, de-facto spouse, parent or child believed the defendant was guilty of the offence. If comment is made by or on behalf of a co-defendant, the judge may comment on both the failure to give evidence and the co-defendant's comment.

Division 2 - Oaths and affirmations

Clause 21: Sworn evidence of witnesses to be on oath or affirmation

44. This clause requires a person to take an oath or make an affirmation before giving sworn evidence. The requirement does not apply to a person called only to produce a document or thing to a court. Forms of oath and affirmation are set out in the Schedule. An affirmation has the same effect as an oath.

Clause 22: Interpreters to act on oath or affirmation

45. This clause requires a person to take an oath or make an affirmation before acting as an interpreter in a proceeding. Forms of oath and affirmation are set out in the Schedule. An affirmation has the same effect as an oath.

Clause 23: Choice of oath or affirmation

46. This clause provides that a person who is to be a witness or act as an interpreter in a proceeding may choose whether to take an oath or make an affirmation.

47. Where a witness refuses to choose whether to take an oath or make an affirmation, or it is not reasonably practicable for the witness to take an appropriate oath, the court may direct the witness to make an affirmation.

Clause 24: Requirements for oaths

48. This clause provides that it is not to be necessary to use a religious text to take an oath. An oath is to be effective whether or not the person who takes it did not

have a religious belief or did not understand the nature and consequences of the oath.

**Clause 25: Rights to make unsworn statements unaffected**

49. This clause preserves any right of a defendant in a criminal proceeding, arising under a State or Territory law, to make an unsworn statement.

**Division 3 - General rules about giving evidence**

**Clause 26: Court's control over questioning of witnesses**

50. This clause states that the court may regulate the manner in which witnesses are questioned, the production and use of documents and things in connection with the questioning of witnesses, the order in which the parties question witnesses and the presence and behaviour of any person in connection with the questioning of witnesses.

**Clause 27: Parties may question witnesses**

51. This clause states the general principle that every party is entitled to question any witness who gives evidence, except where the Act provides to the contrary.

**Clause 28: Order of examination in chief, cross-examination and re-examination**

52. This clause provides the usual order in which parties may question a witness.

**Clause 29: Manner and form of questioning witnesses and their responses**

53. This clause states the general rule that, subject to the control of the court, it is up to the parties to determine how to question witnesses.

54. This clause also allows the court to direct a witness, upon application by the party by whom he or she has been called, to give evidence wholly or partly in narrative form and allows evidence to be given in the form of charts, summaries or other explanatory material if that material would aid the court's comprehension of other evidence.

**Clause 30: Interpreters**

55. This clause provides that a witness can have an interpreter unless he or she can speak and understand English sufficiently to understand questions and give adequate replies to them.

Clause 31: Deaf and mute witnesses

56. This clause provides that deaf and mute witnesses can be questioned, and give evidence, in any appropriate way. The court may give directions on the manner in which such witnesses may be questioned and the means by which they may give evidence.

Clause 32: Attempts to revive memory in court

57. This clause provides that a witness may not use a document to revive his or her memory in giving evidence, unless the court gives leave. The matters which the court must take into account in deciding whether to give leave include:

- whether the witness can recall the fact adequately without using the document; and
- whether the document was written by the witness, or found by him or her to be accurate when the events it records were fresh in his or her memory.

58. The witness may, with leave of the court, read the document aloud as part of his or her evidence.

59. The court is to order that so much of the document as relates to the proceedings is to be produced to another party, if that party so requests.

Clause 33: Evidence given by police officers

60. This clause provides that in a criminal proceeding a police officer may give evidence in chief for the prosecution by reading or being led through a written statement previously made by him or her.

61. Such evidence may only be given where the statement was made by the officer at the time of or soon after the occurrence of the events to which it refers, the police officer signed the statement when it was made and a copy of the statement was given to the person charged or his or her lawyer a reasonable time before the prosecution evidence is given.

Clause 34: Attempts to revive memory out of court

62. This clause provides that where a witness has used a document or thing to revive his or her memory other than while giving evidence, the court may, at the request of a party, direct that the document or thing be produced to the party. If the

direction is not complied with, the court may refuse to admit evidence given by the witness about a fact concerning which he or she tried to revive his or her memory.

**Clause 35: Effect of calling for production of documents**

63. This clause abolishes the rule in Walker v. Walker (1937) 57 CLR 630. Under that rule, the party called on to produce a document may require the party who called for and inspected the document to tender it. The result of the rule is that a document which might otherwise be inadmissible may be admitted in evidence

**Clause 36: Person may be examined without subpoena or other process**

64. This clause allows the court to order a person who is present at the hearing to give evidence or produce documents. A person so ordered is subject to the same liabilities as if he or she had been served with a subpoena.

**Division 4 - Examination in chief and re-examination**

**Clause 37: Leading questions**

65. This clause provides that, unless the court gives leave, leading questions may not be put to witnesses in examination in chief or re-examination.

66. Leave is not required where the question relates to an introductory matter or a matter not in dispute, or where the question is put to an expert witness for the purpose of obtaining his or her opinion about a hypothetical statement of facts. Leave is also not required where all the parties to the proceeding, other than the party examining the witness, are represented by a lawyer and no objection is made.

67. Unless the court otherwise directs, leading questions may be put in civil proceedings to a witness relating to an investigation, inspection or report he or she made in the course of carrying out public or official duties.

68. Any power of a court under rules of court to allow a written statement or report to be tendered or treated as evidence in chief is preserved.

**Clause 38: Unfavourable witnesses**

69. This clause provides that a party may, with the leave of the court, cross-examine his or her own witness about evidence the witness has given that is unfavourable to the party, about a matter of which the witness may reasonably be supposed to have knowledge about which it appears that he or she is not making a

genuine attempt to give evidence, or about whether the witness has made a prior inconsistent statement.

70. To overcome the decision of the High Court in Vocisano v. Vocisano (1974) 130 CLR 267, a person conducting a proceeding in the name of a party (e.g. an insurer conducting an action in the name of an insured) is to be able, where the party is called as a witness, to cross-examine the party in the same circumstances as the person may cross-examine any other witness.

71. In determining whether to grant leave to a party to cross-examine his or her own witness, a court is to take into account whether the party gave notice at the earliest opportunity of his or her intention to seek leave and the matters on which, and the extent to which, the witness has been, or is likely to be, questioned by another party.

#### Clause 39: Limits on re-examination

72. This clause provides that, unless the court gives leave, a witness on re-examination may only be questioned about matters arising out of evidence given by the witness in cross-examination.

#### Division 5 - Cross-examination

##### Clause 40: Witness called in error

73. This clause applies where a witness has been called in error. A party is not to cross-examine the witness unless he or she has given evidence in the proceeding.

##### Clause 41: Improper questions

74. This clause provides that a court may disallow, or inform the witness he or she need not answer, a question that is misleading or unduly annoying, harassing, intimidating, offensive, oppressive or repetitive. In deciding whether to exercise its powers the court is to take into account relevant characteristics of the witness (such as age or education) and any mental or physical disability.

##### Clause 42: Leading questions

75. This clause provides that a party may put a leading question to a witness in cross-examination, unless the court disallows the question or directs the witness not to answer it. Where the court is satisfied that the facts would be better ascertained if

leading questions are not used, it must disallow the question or direct the witness not to answer it.

76. In deciding whether to disallow a question or give a direction, the court is to take into account, amongst other things, the extent to which the witness or his or her evidence is supportive of the cross-examiner.

#### Clause 43: Prior inconsistent statements of witnesses

77. This clause provides that a party may cross-examine a witness about a prior statement the witness is alleged to have made that is inconsistent with his or her evidence. It is not necessary to put complete particulars of the statement to the witness or to show the witness a document that records the statement.

78. If the witness does not admit he or she made a prior inconsistent statement, the cross-examiner cannot adduce evidence of the statement from another person, unless the cross-examiner informed the witness of enough of the circumstances of the making of the statement to identify it and drew the witness's attention to the inconsistency.

#### Clause 44: Previous representations of other persons

79. This clause sets out when a party can, in cross-examination of a witness, ask him or her about a previous representation made by another person. The party may cross-examine the witness on it generally where the evidence of the representation has been or will be admitted in evidence.

80. However, if the representation is recorded in a document which has not been, and will not be, admitted in evidence, the document may only be produced to the witness, and the witness may only be asked whether, having examined it, he or she still adheres to his or her evidence.

#### Clause 45: Production of documents

81. This clause provides for the production and examination of a document recording a prior inconsistent statement of the witness, or a previous representation made by a person other than the witness, that is raised in cross-examination.

82. The court, or a party other than the cross-examining party, may require the cross-examining party to produce the document, or such evidence of its contents as is available to him or her. The court may give directions about its use and may admit it (unless the document is not admissible). Production of the document to a witness

in cross-examination does not require the cross-examining party to tender the document.

**Clause 46: Leave to recall witnesses**

83. This clause provides that a court may give leave to a party to recall a witness to be questioned about a matter (including an inference) raised by evidence adduced by another party, being a matter on which the witness was not cross-examined, if that evidence has been admitted and:

- it contradicts evidence given in chief by the witness about the matter; or
- the witness could have given evidence in chief about the matter.

**PART 2.2 - DOCUMENTS**

**Clause 47: Definitions**

84. This clause defines 'document in question' for the purposes of Part 2.2 as a document about the contents of which it is sought to adduce evidence, and a 'copy of a document in question' to include a document that is not an exact copy provided it is identical in all relevant respects.

**Clause 48: Proof of contents of documents**

85. This clause sets out the ways in which a party can adduce evidence of the contents of a document.

86. A party may adduce evidence of the contents of a document by tendering the original document or by tendering any of the following:

- a copy of the document produced by a device (for example, a photocopier or a word processor) that reproduces the contents of documents;
- if the content of the document is not in visible form (for example, a tape-recording) or is in a code (for example, shorthand notes), a transcript;
- if the document is an article or thing on or in which information is stored in such a way that it cannot be used unless a device is used to retrieve, produce or collate it, a document produced by the device (for example, computer output or a document produced by an optical laser disk reader);

a business record that is an extract from, or a summary or copy of, the document;

- if the document is a public document, an official printed copy of the document.

87. A party may also adduce evidence of the contents of a document by adducing evidence of an admission made by another party about its contents. Evidence adduced in this way may be used either by the party who adduced it against the party who made the admission, or by the party who made the admission against the party who adduced the evidence.

88. Where the document is unavailable, or where its existence or contents are not in issue in the proceeding, evidence of its contents may be adduced by tendering a copy or summary of, or extract from, the document or by adducing oral evidence of the contents.

#### Clause 49: Documents in foreign countries

89. This clause provides that evidence of the contents of a document in a foreign country cannot be adduced under clause 48, except by tendering the original document or adducing evidence of an admission by another party, unless either a copy of the document that is to be tendered has been served on each other party in the proceeding not less than 28 days (or other prescribed period) beforehand, or the court makes a direction to the contrary.

#### Clause 50: Proof of voluminous or complex documents

90. This clause enables a party to apply to a court before a hearing for a direction that he or she may adduce evidence of the contents of 2 or more documents in the form of a summary if it would not otherwise be possible conveniently to examine the evidence because of the volume or complexity of the documents in question.

91. The court may only make such a direction if the applicant has served on each other party a copy of the summary disclosing the name and address of the person who prepared it, and has given each other party a reasonable opportunity to examine or copy the documents.

92. The opinion rule (clause 76) does not apply to evidence adduced under this clause.



Clause 51: Original document rule abolished

93. This clause abolishes the original document rule which provides that the contents of a document, except in certain limited circumstances, must be proved by production of the original document.

PART 2.3 - OTHER EVIDENCE

Clause 52: Adducing of other evidence not affected

94. This clause provides that except for Part 2.3 this Act does not affect the operation of any law or rule of practice which permits evidence to be adduced otherwise than by witnesses being called or documents being tendered in evidence.

Clause 53: Views

95. This clause enables the judge to order that a demonstration, experiment or inspection be held. The judge is not to make the order unless satisfied that the parties will be given a reasonable opportunity to be present.

96. The clause also sets out the matters the judge must take into account in deciding whether to make an order. These include whether the demonstration etc. will, in the opinion of the court, assist it in resolving issues of fact or understanding the evidence, whether the parties will be present, whether the demonstration etc might be unfairly prejudicial, misleading or confusing, or might waste time and whether a demonstration of an event will properly reproduce the event.

Clause 54: Views to be evidence

97. This clause provides that the court may draw any reasonable inference from what it sees, hears or otherwise notices at a demonstration, experiment or inspection.

## CHAPTER 3 - ADMISSIBILITY OF EVIDENCE

### PART 3.1 - RELEVANCE

#### Clause 55: Relevant evidence

98. This clause states the principal rule concerning the admission of evidence, the relevance rule. Evidence is relevant if it could rationally affect (whether directly or indirectly) the assessment of the probability of the existence of a fact in issue.

99. Evidence which would be admissible under the test, although only marginally relevant, may be excluded under clause 135.

100. Evidence is not to be taken to be irrelevant only because it relates to the credibility of a witness, admissibility of other evidence, or a failure to adduce evidence.

#### Clause 56: Relevant evidence to be admissible

101. This clause states the basic rule of admissibility.

102. Evidence that is relevant is admissible unless excluded by one of the exclusionary rules set out in the Act. Evidence that is not relevant is not admissible.

#### Clause 57: Provisional relevance

103. This clause enables a court to admit evidence provisionally. If the determination of whether evidence is relevant depends upon the court making a finding on a matter, the court may find that the evidence is relevant if it is reasonably open to make the finding in question, or may find it is relevant subject to the admission of further evidence, as a result of which it will be reasonably open to make the finding in question.

#### Clause 58: Inferences as to relevance

104. This clause enables a court to examine a document or thing for the purpose of determining its relevance and to draw any reasonable inference from it.

### PART 3.2 - HEARSAY

105. This Part sets out the exclusionary rule for hearsay evidence and exceptions to that rule.

## Division 1 - The hearsay rule

### Clause 59: The hearsay rule - exclusion of hearsay evidence

106. This clause sets out the general exclusionary rule for hearsay evidence ('the hearsay rule'). The rule prevents evidence of a previous representation made by a person being admitted to prove the existence of a fact ('the asserted fact') that the person intended to assert by the representation. The rule is subject to several exceptions.

### Clause 60: Evidence relevant for a non-hearsay purpose

107. This clause provides that evidence that is admitted because it is relevant for a purpose other than to prove the existence of an asserted fact must not be used to prove that fact.

### Clause 61: Exceptions to the hearsay rule dependent on competency

108. This clause provides that Part 3.2 does not enable the use of a previous representation to prove an asserted fact if the person who made the representation was not, at the time, competent to give evidence because he or she was incapable of giving a rational reply to a question about the fact. Competence is presumed unless the contrary is proved.

## Division 2 - "First-hand" hearsay

### Clause 62: Restriction to "first hand" hearsay

109. This clause provides that in Division 2 'previous representation' refers only to a representation made by a person who had, or might reasonably be supposed to have had, personal knowledge of the fact asserted in the representation, other than from a representation made by some other person about the asserted fact. Such a representation is referred to below as 'first-hand' hearsay.

### Clause 63: Exception: civil proceedings if maker not available

110. This clause provides an exception to the hearsay rule in civil proceedings where the maker of a 'first-hand' hearsay representation is not available to give evidence about an asserted fact.

111. In these circumstances, oral evidence of the representation may be given by a person who witnessed it. Alternatively, a document containing the representation, or another representation reasonably necessary to understand it, may be admitted.

**Clause 64: Exception: civil proceedings if maker available**

112. This clause provides for 2 exceptions to the hearsay rule in civil proceedings where the maker of the 'first-hand' hearsay representation is available to give evidence.

113. First, where it would cause undue expense or undue delay or it would not be reasonably practicable to call the maker of the representation to give evidence, oral evidence of the representation may be given by a person who witnessed it. Alternatively, a document containing the representation, or any other representation reasonably necessary to understand it, may be admitted.

114. Secondly, where the maker of the representation has been, or is to be, called to give evidence, evidence of the representation may be given by the maker, or by someone else who witnessed it, if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the maker.

115. Documentary evidence of the representation is not to be tendered before conclusion of the examination in chief of the maker, unless the court gives leave.

**Clause 65: Exception: criminal proceedings if maker not available**

116. This clause provides for exceptions to the hearsay rule in criminal proceedings where the maker of the 'first-hand' hearsay representation is not available to give evidence.

117. First, evidence of the representation can be given if it was:

- made in the course of a duty to make such a representation;
- made when or shortly after the asserted fact occurred and in circumstances that make it unlikely it was a fabrication;
- made in circumstances that make it highly probable that the representation is reliable;
- made in the course of giving evidence in another proceeding where the defendant in the present proceeding cross-examined, or had a reasonable opportunity to cross-examine, the person who made it; or
- against the interests of the maker at the time the representation was made (for example, it would tend to damage the reputation of the

maker, incriminate him or her, or show he or she is liable in an action for damages).

118. Evidence of such a representation made in the course of giving evidence in another proceeding may be adduced by producing an authenticated transcript or recording.

119. Secondly, a defendant can adduce evidence of a 'first-hand' hearsay representation by:

adducing oral evidence of the representation from a person who witnessed it; or

- tendering a document containing such a representation or any other representation reasonably necessary to understand it.

120. Where evidence of that kind has been adduced by a defendant about a particular matter, the prosecution or another defendant may adduce evidence of another previous representation about the matter.

Clause 66: Exception: criminal proceedings if maker available

121. This clause provides an exception to the hearsay rule in criminal proceedings where the maker of the 'first-hand' hearsay representation is available to give evidence.

122. If the maker has been or is to be called to give evidence, evidence of the representation may be given by the maker, or by someone else who witnessed the representation, if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the maker.

123. If a representation was made for the purpose of indicating the evidence that the person who made it would be able to give in a proceeding, the exception to the hearsay rule is not to apply to evidence adduced by the prosecutor unless the representation concerns the identity of a person, place or thing.

124. Documentary evidence of the representation is not to be tendered before conclusion of the examination in chief of the maker, unless the court gives leave.

Clause 67: Notice to be given

125. This clause requires a party seeking to adduce evidence of a 'first-hand' hearsay representation (other than rebuttal 'first-hand' hearsay) where the maker of

the representation is not available, or is not called, to give reasonable notice to each other party of his or her intention to adduce the evidence. The court may dispense with the notice requirement conditionally or otherwise.

**Clause 68: Objections to tender of hearsay evidence in civil proceedings if maker available**

126. This clause provides that in civil proceedings a party may object to the tender of hearsay evidence, where the maker of the representation is available, but is not to be called to give evidence. The court may determine the objection at or before the hearing. If the objection is unreasonable the court may order that the party objecting pay the costs incurred in relation to the objection and in calling the maker to give evidence.

**Division 3 - Other exceptions to the hearsay rule**

**Clause 69: Exception: business records**

127. Under this clause, the hearsay rule does not apply to a representation in a document that is or was part of the records of a business, and was made in the course of, or for the purposes of, a business, if the representation was made by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact, or was made on the basis of information directly or indirectly supplied by such a person.

128. This exception does not apply to a representation prepared in connection with possible proceedings or made in connection with a criminal investigation.

129. Secondly, the hearsay rule does not apply to evidence that there is no record in a business record keeping system of the happening of an event normally recorded in the system.

**Clause 70: Exception: contents of tags, labels and writing**

130. This clause excepts from the hearsay rule a tag or label attached to, or writing placed on, an object in the course of a business for the purpose of describing the identity, nature, ownership, destination, origin or weight of the object, or of its contents (if any).

131. The exception and any State or Territory law to similar effect will not apply to a Customs prosecution under the *Customs Act 1901* or an Excise prosecution under the *Excise Act 1901*.

Clause 71: Exception: telecommunications

132. This clause excepts from the hearsay rule a representation in a document recording a message that has been transmitted by fax, electronic mail, telegram, lettergram or telex that is a representation about the identity of the person who sent the message, the day or time it was sent, the message's destination or the identity of the person to whom it was addressed.

Clause 72: Exception: contemporaneous statements about a person's state of mind, health etc.

133. This clause provides that the hearsay rule does not apply to evidence of a previous representation made by a person about his or her health, feelings, sensations, intention, knowledge or state of mind when he or she made the representation.

Clause 73: Exception: reputation as to relationships and age

134. This clause provides for exceptions to the hearsay rule for evidence of reputation about marriage, cohabitation, a person's age and family history or relationship. In a criminal proceeding, the exception is limited to evidence adduced by a defendant, or by the prosecution to rebut evidence about reputation adduced by a defendant. The defendant must give each other party reasonable notice in writing of his or her intention to adduce such evidence except where it is adduced in rebuttal.

Clause 74: Exception: reputation of public or general rights

135. This clause provides for an exception to the hearsay rule in relation to evidence of reputation about a public or general right. In a criminal proceeding, the exception is limited to evidence adduced by a defendant, or by the prosecution to rebut evidence about reputation adduced by a defendant.

Clause 75: Exception: interlocutory proceedings

136. This clause provides for an exception to the hearsay rule for evidence adduced in interlocutory proceedings, if the party who adduces it also adduces evidence of its source.

### PART 3.3 - OPINION

Clause 76: The opinion rule

137. This clause sets out the general exclusionary rule for opinion evidence. Evidence of an opinion is not admissible to prove a fact asserted by the opinion.

Clause 77: Exception: evidence relevant otherwise than as opinion evidence

138. This clause permits the use of evidence of an opinion to prove a fact asserted by the opinion if the evidence of the opinion is admitted because it is relevant for another purpose.

Clause 78: Exception: lay opinions

139. This clause permits opinion evidence where it is based on the person's own perception of an event and evidence of the opinion is necessary to obtain an adequate understanding of the person's perception of the event.

Clause 79: Exception: opinions based on specialised knowledge

140. This clause permits opinion evidence that is wholly or substantially based on specialised knowledge. The person expressing the opinion must have specialised knowledge based on training, study or experience. It is not necessary for the person to be formally qualified. Relevant experience will suffice.

Clause 80: Ultimate issue and common knowledge rules abolished

141. This clause abolishes the common law rules known as the ultimate issue and the common knowledge rules.

142. The ultimate issue rule prevents a witness from giving evidence on an issue the court is to decide. The common knowledge rule excludes expert opinion evidence on matters of common knowledge.

### PART 3.4 - ADMISSIONS

143. This Part sets out exceptions to the hearsay and opinion rules relating to admissions.



**Clause 81: Hearsay and opinion rules: exception for admissions and related representations**

144. This clause excepts from the hearsay and opinion rules evidence of an admission and evidence of a representation made at or about the time of the admission that is reasonably necessary to understand the admission.

**Clause 82: Exclusion of evidence of admissions that is not first-hand**

145. This clause qualifies the exception created by clause 81. The hearsay rule will apply to evidence of an admission unless the evidence is given orally by a person who witnessed the admission or the evidence is contained in a document in which a person asserts he or she witnessed the evidence.

**Clause 83: Exclusion of evidence of admissions as against third parties**

146. This clause restricts the use that can be made of an admission. The hearsay rule and the opinion rule apply so that evidence of an admission cannot be used in relation to the case of a third party unless that third party consents. Consent cannot be given in respect of part only of the evidence.

**Clause 84: Exclusion of admissions influenced by violence and certain other conduct**

147. This clause provides that where the party against whom evidence of an admission is being led raises an issue in the proceeding about whether the admission was influenced by violent, oppressive, inhuman or degrading conduct, or by a threat of such conduct, evidence of the admission is not admissible unless the court is satisfied that the admission was not influenced by that conduct or by a threat of that conduct.

**Clause 85: Criminal proceedings: reliability of admissions by defendants**

148. This clause provides that an admission made by a defendant in a criminal proceeding after a promise, threat or other form of inducement by an investigating official or some other person able to influence the prosecution process is inadmissible unless the circumstances in which it was made make it unlikely that the truth of the admission was adversely affected. The matters the court is to take into account in deciding whether the truth was adversely affected include any relevant

characteristic of the defendant, the nature of any questioning, and the nature of the threat, promise or inducement made.

Clause 86: Exclusion of records of oral questioning

149. This clause makes inadmissible in a criminal proceeding any document (other than a sound or video recording, or transcript of such a recording) purporting to be a record of interview with a defendant unless the defendant acknowledged the document as a true record by signing or otherwise marking it.

Clause 87: Admissions made with authority

150. This clause sets out the circumstances in which a representation made by another person is treated as being an admission made by a party.

151. A representation made by another person is taken also to have been made by a party if:

- the person had authority to make statements on behalf of the party in relation to the matter concerned;
- it was made by an employee or agent about a matter within the scope of his or her employment or authority; or
- it was made in furtherance of a common purpose with the party.

152. The hearsay rule is not to apply, for the purposes of the clause, to evidence of a previous representation made by a person about his or her employment or authority to make statements or act on behalf of a party.

Clause 88: Proof of admissions

153. This clause provides that to determine whether evidence of an admission is admissible the court is to find that a person made an admission if it is reasonably open so to find.

Clause 89: Evidence of silence

154. This clause prohibits unfavourable inferences (including an inference of consciousness of guilt or an inference relevant to a party's credibility) being drawn in a criminal proceeding from a failure by a person to answer a question, or respond to a representation, during official questioning. Where the only use that could be made of such evidence would be to draw such an inference, the evidence is

inadmissible. The clause does not apply where the failure to answer or respond is a fact in issue in the proceedings.

155. The provision is not concerned with the drawing of inferences from facts.

Clause 90: Discretion to exclude admissions

156. This clause provides that in a criminal proceeding if, having regard to the circumstances in which an admission was made, it would be unfair to an accused to use evidence of the admission in the prosecution case, the court may refuse to admit the evidence, or refuse to admit it to prove a particular fact.

### PART 3.5 - EVIDENCE OF JUDGMENTS AND CONVICTIONS

157. This Part abolishes the rule known as the rule in Hollington v. Hewthorn [1943] KB 587. In that case, evidence of a conviction was held to be inadmissible in civil proceedings to prove the facts on which it was based.

Clause 91: Exclusion of evidence of judgments and convictions

158. This clause provides a basic rule that evidence of the decision or a finding of fact in any proceeding is not admissible to prove a fact in issue in that proceeding. Where evidence of the decision is otherwise relevant, it cannot be used for the purpose of proving such a fact. This rule is subject to clauses 92 and 93.

Clause 92: Exceptions

159. This clause provides for exceptions to the hearsay rule, the opinion rule and the rule in clause 91. The exceptions are evidence of a grant of probate or letters of administration to prove a death, date of death or due execution of a will, and evidence in a civil proceeding of a conviction of a party or a person through whom a party claims (other than a conviction that has been quashed or set aside, in respect of which a pardon has been given, or which is under appeal).

Clause 93: Savings

160. This clause preserves existing law relating to the admissibility of convictions in defamation proceedings, a judgment in rem, res judicata and issue estoppel.

### PART 3.6 - TENDENCY AND COINCIDENCE

161. This Part provides for the admissibility of evidence relating to conduct, reputation, character and tendency of parties and witnesses, which is relevant to a fact in issue in the proceedings. It does not apply where such reputation etc is a fact in issue or relates only to the credibility of witnesses. Credibility evidence is dealt with in Part 3.7. Part 3.8 sets out special rules relating to evidence of the character of a defendant in a criminal proceeding.

#### Clause 94: Application

162. This clause provides that Part 3.6 is not to apply to evidence that relates only to the credibility of a witness, evidence in a proceeding so far as it relates to bail or sentencing, or evidence of character, reputation, conduct or a tendency of a person that is a fact in issue in the proceeding.

#### Clause 95: Use of evidence for other purposes

163. This clause provides that if evidence which, under Part 3.6, is not admissible, or can not be used against a party, to prove a particular matter is relevant for another purpose (and so may be admissible), it must not be used to prove that particular matter.

#### Clause 96: Failure to act

164. This clause provides that a reference in Part 3.6 to the doing of an act includes a reference to failing to do that act.

#### Clause 97: The tendency rule

165. This clause sets out the first exclusionary rule for tendency evidence. The rule ('the tendency rule') prevents evidence of a person's character, reputation, conduct or tendency to prove that the person has or had a tendency to act in a particular way or to have a particular state of mind in 2 circumstances. These are, firstly, where notice has not been given (clause 97) or dispensed with (clause 100) and, secondly, where the court considers that the evidence would not, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the tendency evidence, have significant probative value.

166. The rule does not apply to tendency evidence adduced to explain or contradict tendency evidence adduced by another party.

Clause 98: The coincidence rule

167. This clause sets out the first exclusionary rule for similar fact evidence which is adduced for a coincidence purpose. That is, the clause applies to evidence of 2 or more events where the events and the circumstances in which they occurred are substantially and relevantly similar, adduced to prove that, because of the improbability of the events occurring coincidentally, a person did a particular act or had a particular state of mind.

168. The clause does not apply to coincidence evidence that is not similar fact evidence.

169. The rule prevents similar fact evidence being led to prove that, because of the improbability of the events occurring coincidentally, a person did a particular act or had a particular state or mind, in 2 circumstances. These are, firstly, where notice has not been given (clause 98) or dispensed with (clause 100) and, secondly, where the court considers that the evidence could not, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the coincidence evidence, have significant probative value.

170. The rule does not apply to evidence adduced to explain or contradict coincidence evidence adduced by another party.

Clause 99: Requirements for notices

171. This clause provides that notices relating to tendency or coincidence evidence are to be given in accordance with any regulations or rules of court.

Clause 100: Court may dispense with notice requirements

172. This clause enables the court, on the application of a party, to direct that the tendency rule or the coincidence rule is not to apply to particular evidence despite the party's failure to give notice under clauses 97 or 98. The direction may be subject to conditions (and may be given at or before the hearing).

173. The application may be made either before or after the time the party would be required to give notice and, in a civil proceeding, may be made without notice having been given to one or more of the parties.

Clause 101: Further restrictions on tendency evidence and coincidence evidence adduced by prosecution

174. This clause sets out a second exclusionary rule relating to tendency evidence and coincidence evidence in criminal proceedings. It applies in addition to the preceding requirements of this Part. The prosecution in a criminal proceeding is not to adduce tendency evidence about a defendant (except to explain or contradict tendency evidence adduced by the defendant) unless its probative value substantially outweighs any prejudicial effect it may have on the defendant.

175. Similarly the prosecution in a criminal proceeding is not to adduce coincidence evidence about a defendant (except to explain or contradict coincidence evidence adduced by the defendant) unless its probative value substantially outweighs any prejudicial effect it may have on the defendant.

#### PART 3.7 - CREDIBILITY

Clause 102: The credibility rule

176. This clause states a basic rule ('the credibility rule') that evidence which is relevant only to the credibility of a witness is not admissible.

Clause 103: Exception: cross-examination as to credibility

177. This clause provides that the credibility rule does not apply to evidence which is adduced in cross-examination of the witness and has substantial probative value.

178. The matters a court may take into account in deciding whether the evidence has substantial probative value include:

- whether the evidence tends to prove that the witness knowingly or recklessly made a false representation when under an obligation to tell the truth; and
- the period that has elapsed since the acts or events to which the evidence relates.

Clause 104: Further protections: cross-examination of accused

179. This clause applies, in addition to clause 103, to cross-examination of a defendant in a criminal proceeding.

180. The prosecution is to be able to cross-examine a defendant on a matter relevant only to the credibility of the defendant if the questioning is about:

whether the defendant is biased or has a motive to be untruthful;

the defendant's capacity to be aware of or recall matters to which his or her evidence relates; or

whether he or she has made a prior inconsistent statement.

181. In other circumstances, the defendant can be cross-examined on a matter relevant only to his or her credibility if the court gives leave. Leave is not to be given for cross-examination by the prosecution unless the defendant has adduced evidence about his or her own good character or evidence attacking the credit of a prosecution witness.

182. Leave is not to be given for a co-defendant to cross-examine a defendant on a matter relevant only to the credibility of that defendant unless that defendant has given evidence adverse to the co-defendant.

Clause 105: Further protections: defendants making unsworn statements

183. This clause sets out the situations in which, where a defendant in a criminal proceeding has made an unsworn statement under a law of a State or Territory, evidence may be adduced from a person relating solely to the credibility of the defendant.

184. Such evidence may be adduced, without leave of the court, where it is relevant and has substantial probative value and relates to:

whether the defendant is biased or has a motive to be untruthful;

the defendant's capacity to observe and recall the matters to which his or her statement relates; or

whether the defendant has made a prior inconsistent statement.

185. Such evidence may be adduced, with leave of the court, if it has substantial probative value and the defendant has, in his or her unsworn statement:

raised his or her own good character; or

attacked the credit of a prosecution witness.

**Clause 106: Exception: rebutting denials by other evidence**

186. This clause provides that the credibility rule does not apply to evidence that shows a witness:

- is biased or has a motive to be untruthful;
- has prior convictions;
- has made a prior inconsistent statement;
- cannot be aware of the matters to which his or her evidence relates; or
- has knowingly or recklessly made a false representation when under a legal obligation to tell the truth;

if the evidence is adduced otherwise than from that witness and that witness has denied the substance of it.

**Clause 107: Exception: application of certain provisions to makers of representations**

187. This clause applies where hearsay evidence has been admitted and the maker of the representation has not been called to give evidence. It permits admission of credibility evidence about matters on which the maker of the representation could have been cross-examined if he or she had given evidence.

**Clause 108: Exception: re-establishing credibility**

188. This clause provides that the credibility rule does not apply to evidence adduced in re-examination, (if the court gives leave) evidence explaining or contradicting evidence admitted under clause 105 and 107 and (if the court gives leave) in some circumstances, evidence of a prior consistent statement.

**PART 3.8 - CHARACTER**

189. This Part sets out rules relating to evidence of the character of a defendant in a criminal proceeding.

**Clause 109: Application**

190. This clause provides that Part 3.8 applies in a criminal proceeding.



Clause 110: Evidence about character of accused persons

191. This clause provides exceptions to the hearsay rule, the opinion rule, the tendency rule and the credibility rule for evidence adduced:

by a defendant about his or her own good character, either generally or in a particular respect; and

to rebut such evidence.

192. The clause applies both to evidence adduced by a defendant and to an unsworn statement by a defendant under a law of a State or Territory.

Clause 111: Evidence about character of co-accused

193. This clause provides an exception to the hearsay rule and the tendency rule for expert opinion evidence about a defendant's character adduced by another defendant. It also provides an exception to those rules and to the opinion rule for evidence rebutting such opinion evidence.

Clause 112: Leave required to cross-examine about character of accused or co-accused.

194. This clause provides that a defendant cannot be cross-examined on matters arising out of evidence about his or her character unless the court gives leave.

### PART 3.9 - IDENTIFICATION EVIDENCE

195. This Part sets out exclusionary rules for visual identification evidence in a criminal proceeding, and provides for the giving of warnings to juries about the special need for caution before accepting identification evidence.

Clause 113: Application of Part

196. This clause provides that Part 3.9 applies only in a criminal proceeding.

Clause 114: Exclusion of visual identification evidence

197. The clause provides a general exclusionary rule for prosecution visual identification evidence. Visual identification evidence adduced by the prosecution is not to be admissible unless:

either an identification parade that included the defendant was held before the identification was made, or it was not reasonable to hold such a parade; and

- the identification was made without the person who made it having been intentionally influenced to identify the defendant.

198. It is to be presumed that it would not have been reasonable to hold an identification parade if the defendant refused to co-operate in its conduct unless a lawyer or some other person was present and there were reasonable grounds to believe that it was not reasonably practicable for such a lawyer or person to be present.

199. The matters the court is to take into account in deciding whether it was reasonable to hold an identification parade include the kind and gravity of the offence, the importance of the evidence, the practicality of holding such a parade and the appropriateness of holding such a parade having regard to any relationship between the defendant and the person who made the identification. The court is not to take into account the availability of pictures that could be used in making identifications.

Clause 115: Exclusion of evidence of identification by pictures

200. This clause provides an exclusionary rule for prosecution visual identification evidence where the identification was made wholly or partly as a result of the person who made it examining pictures kept for use by police officers.

201. Prosecution picture identification evidence is not admissible unless the pictures examined did not suggest that they were pictures of a person in police custody.

202. Where the defendant was in custody when the pictures were examined, picture identification evidence is not admissible unless the picture of the defendant that was examined was taken after the defendant was taken into that custody, except where:

- the defendant's appearance had changed significantly between when the offence for which the defendant is being prosecuted was committed and when the defendant was taken into that custody; or

it was not reasonably practicable to make such a picture.

203. However, this clause does not make inadmissible prosecution picture identification evidence adduced to rebut picture identification evidence led by the defendant.

204. Where a picture made after the defendant was taken into custody is admitted into evidence, the judge must, on the request of the defendant, inform the jury that the picture was made after the defendant was taken into that custody. Where a picture made otherwise is admitted into evidence, the judge must, on the request of the defendant, warn the jury that it must not assume that the defendant has a criminal record or has previously been charged with an offence.

Clause 116: Directions to jury

205. This clause requires that if identification evidence has been admitted the judge must inform the jury that there is a special need for caution before accepting identification evidence and of the reasons for that need, both generally and in the circumstances of the case.

### PART 3.10 - PRIVILEGES

206. This Division sets out grounds on which a person can claim evidence should not be required and for the exclusion of evidence based on public policy considerations.

Division 1 - Client legal privilege

Clause 117: Definitions

207. This clause defines words and expressions used in Part 3.10 Division 1.

Clause 118: Client legal privilege: legal advice

208. This clause provides for client legal privilege in relation to the provision of legal advice.

209. If the client objects, evidence is not to be given that would disclose:

- a confidential communication made between a client and a lawyer;
- a confidential communication made between two or more lawyers acting for the client; or

the contents of a confidential document prepared by the client or a lawyer,

for the sole purpose of one or more of the lawyers providing legal advice to the client.

**Clause 119: Client legal privilege: litigation**

210. This clause provides for client legal privilege in relation to the provision of professional legal services relating to litigation.

211. If the client objects, evidence is not to be given that would disclose:

- a confidential communication made between a client and another person;
- a confidential communication made between a lawyer acting for the client and another person; or
- the contents of a confidential document prepared,

for the sole purpose of the client being provided with professional legal services in connection with litigation, or anticipated litigation involving, or possibly involving, the client.

**Clause 120: Client legal privilege: unrepresented parties**

212. This clause provides a privilege for unrepresented parties in litigation.

213. If a party who is not represented by a lawyer in litigation objects, evidence is not to be given that would disclose:

- a confidential communication made between the party and some other person; or
- the contents of a confidential document prepared by or for the party

for the sole purpose of preparing for or conducting the litigation.

**Clause 121: Loss of client legal privilege: generally**

214. This clause provides for general exceptions to the privilege, namely evidence:

about the intentions or competence of a client or party who has died;

- if it could reasonably be expected that the court would be prevented from enforcing an order of an Australian court if the evidence is not adduced; or

of a communication or document that affects the rights of a person.

Clause 122: Loss of client legal privilege: consent and related matters

215. This clause provides for exceptions to the privilege relating to disclosure by or with the consent of the client or party.

Clause 123: Loss of client legal privilege: defendants

216. This clause provides an exception from the privilege in favour of a defendant in a criminal proceeding. The privilege does not prevent such a defendant adducing evidence except when his or her evidence would disclose:

a confidential communication made between an associated defendant and a lawyer acting for that person in connection with the prosecution of that person; or

the contents of a confidential document prepared by an associated defendant or a lawyer acting for such a defendant in connection with the prosecution.

Clause 124: Loss of client legal privilege: joint clients

217. This clause applies in a civil proceeding in connection with which 2 or more parties, before the proceeding commenced, jointly retained a lawyer in connection with the same matter. The privilege does not prevent one of the parties giving evidence of a communication made by one of them to the lawyer, or the contents of a confidential document prepared by or for one of the parties in connection with the matter.

Clause 125: Loss of client legal privilege: misconduct

218. This clause provides that the privilege does not prevent the adducing of evidence that would disclose a communication made, or the contents of a document prepared, in furtherance of a fraud, an offence, an act that renders a person liable to a civil penalty or a deliberate abuse of a statutory power.

Clause 126: Loss of client legal privilege: related communications and documents

219. This clause provides that where client legal privilege does not prevent evidence being adduced of a communication or a document, it also does not prevent evidence being adduced of another communication or document reasonably necessary to enable a proper understanding of the first communication or document.

Division 2 - Other privileges

Clause 127: Religious confessions

220. This clause provides that a member or former member of the clergy is entitled to refuse to divulge the contents of a religious confession or that such a confession was made. The entitlement applies even if an Act provides that the rules of evidence do not apply, that a person or body is not bound by the rules of evidence or that a person is not excused from answering a question or producing any document or thing because of privilege or otherwise.

221. The entitlement does not apply if the communication involved in the religious confession was made for a criminal purpose.

Clause 128: Privilege in respect of self-incrimination in other proceedings

222. This clause provides a general rule that a court must not require a witness to give particular evidence if the witness objects that the evidence may tend to prove he or she has committed an offence or is liable to a civil penalty, and the court is satisfied there are reasonable grounds for the objection.

223. The court may require the witness to give the evidence, except in the case of self-incrimination with respect to an offence or civil penalty arising under foreign law, if the interests of justice require the witness to give the evidence. In such a case a certificate must be given under the clause.

224. The certificate has the effect that evidence given by the witness to which it relates, and evidence of any information or document or thing obtained as a direct or indirect consequence of the person having given evidence, is not admissible in any Australian proceeding, except a criminal proceeding in respect of the falsity of the evidence.

225. Except where the court requires the witness to give evidence, if the court finds there are reasonable grounds for the objection, the witness must be given the option to not give the particular evidence, or to give the evidence and to receive a certificate. A certificate must also be given where the witness gives evidence after his or her objection has been overruled and, after the evidence is given, the court finds there were reasonable grounds for the objection.

226. The clause does not apply when a defendant gives evidence in a criminal proceeding about a fact in issue in the proceeding.

### Division 3 - Evidence excluded in the public interest

#### Clause 129: Exclusion of evidence of reasons for judicial etc. decisions

227. This clause prohibits evidence of the reasons for a decision, or of the deliberations, of a judge or an arbitrator being given by the judge or arbitrator, or by a person then under his or her direction or control, or by tendering a document prepared by any of these persons. This does not apply to published reasons for a decision. It also prohibits evidence of the reasons for a decision or the deliberations of a member of a jury in a proceeding being given by any jury member in another proceeding.

228. The clause does not apply to proceedings for certain offences relating to the administration of justice, appeals and proceedings relating to knowingly acting in excess of jurisdiction.

#### Clause 130: Exclusion of evidence of matters of state

229. This clause enables a court to direct that information or a document that relates to matters of state not be admitted into evidence if the public interest in admitting into evidence the information or document is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document.

230. Information or a document that relate to matters of state includes information or a document which, if it was admitted into evidence, would:

prejudice the security, defence or international relations of Australia;

damage inter-governmental relations within Australia;

prejudice the prevention, investigation or prosecution of offences or other contraventions of the law, including proceedings for the recovery of a civil penalty;

- disclose or enable a person to ascertain the existence or identity of a confidential source of information in relation to the enforcement or administration of an Australian law; or
- prejudice the proper functioning of the Commonwealth or a State or Territory government.

231. The clause lists some matters to be taken into account by the court, including the importance of the information or document in the proceeding, the likely effect of adducing evidence of the information or document and means available to limit its publication, and in a criminal proceeding, whether the party seeking to adduce evidence is a defendant or a prosecutor and, if a defendant is seeking to adduce the evidence, whether the direction is to be made subject to a condition that the prosecution be stayed.

Clause 131: Exclusion of evidence of settlement negotiations

232. This clause provides that evidence may not be adduced of a communication made between persons in dispute, or between one of the persons in dispute and another person, or a document prepared, in connection with an attempt to settle the dispute. The clause also lists circumstances where the prohibition does not apply.

Division 4 - General

Clause 132: Court to inform of rights to make applications and objections

233. This clause provides that the court must satisfy itself that a witness or party is aware of his or her rights to claim a privilege under Part 3.10 where it appears that he or she may have a ground for making an objection or application under the Part.

Clause 133: Court may inspect etc. documents

234. This clause enables the court to call for and examine any document with respect to which a question arises under Part 3.10.

Clause 134: Inadmissibility of evidence that must not be adduced or given

235. This clause provides that if, because of a provision of Part 3.10, evidence may not be adduced or given in a proceeding, it is not admissible in the proceeding.



PART 3.11 - DISCRETIONS TO EXCLUDE EVIDENCE

Clause 135: General discretion to exclude evidence

236. This clause provides a discretion to exclude evidence where its probative value is substantially outweighed by the danger it might be unfairly prejudicial to a party, misleading or confusing, or cause undue waste of time.

Clause 136: General discretion to limit use of evidence

237. This clause enables the court to limit the use to be made of evidence if there is a danger that a particular use of it might be unfairly prejudicial to a party, misleading or confusing.

Clause 137: Discretion to exclude prejudicial evidence in certain criminal proceedings

238. This clause requires the court in a criminal proceeding to exclude evidence where its probative value is outweighed by the danger of unfair prejudice to the defendant.

Clause 138: Discretion to exclude improperly obtained evidence

239. This clause provides for exclusion of evidence obtained improperly, unlawfully or in consequence of an impropriety or breach of the law. It applies in both civil and criminal proceedings.

240. Such evidence is to be excluded unless the desirability of admitting it outweighs the undesirability of admitting evidence obtained in the particular way it was obtained.

241. An admission made during the course of questioning, and any evidence obtained in consequence of the admission, is taken to have been obtained improperly if the person conducting the questioning:

did or failed to do an act in the course of questioning which he or she knew or ought to have known was likely to impair the ability of the person being questioned to respond rationally to the questioning; or

made a false statement in the course of questioning which he or she knew or ought to have known was false and likely to cause the person being questioned to make an admission.

242. The court is to take into account, amongst other things, the importance of the evidence, the gravity of the impropriety or contravention and the nature of the proceedings.

Clause 139: Cautioning of persons

243. This clause sets out circumstances in which evidence of a statement made or act done by a person during questioning by investigating officials is to be taken to have been improperly obtained for the purpose of clause 138. It applies both to officials who have the power to arrest and to those with no such power.

244. Evidence of the statement made or act done is taken to have been improperly obtained if the official did not caution the person before starting to question the person in the circumstances set out in the clause. Those circumstances differ depending upon whether the official had the power to arrest.

245. The clause reflects the obligation of investigating officials with a power to arrest to caution persons under Part IC of the *Crimes Act 1914*.

246. The caution must be to the effect that the person need not say or do anything but that anything the person does say or do may be used in evidence. The caution must be given in, or translated into, a language in which the person is able to communicate with reasonable fluency but need not be given in writing unless the person is unable to hear adequately.

247. The requirement for a caution does not apply so far as any Australian law requires the person being questioned to answer questions or do things.

## CHAPTER 4 - PROOF

### PART 4.1 - STANDARD OF PROOF

Clause 140: Civil proceedings: standard of proof

248. This clause provides for the standard of proof for the case of a party in a civil proceeding. The court must find the case of a party proved in a civil proceeding if it is satisfied it has been proved on the balance of probabilities.

Clause 141: Criminal proceedings: standard of proof

249. This clause provides for the standard of proof for the case of the prosecution and a defendant in a criminal proceeding. The court is not to find the case of the prosecution proved unless it is satisfied it has been proved beyond reasonable

doubt. The court is to find the case of a defendant proved if it is satisfied it has been proved on the balance of probabilities.

Clause 142: Admissibility of evidence: standard of proof

250. This clause provides for the standard of proof for a finding of fact necessary for deciding a question whether evidence should or should not be admitted in a proceeding, or any other question arising under the Act, if the Act does not otherwise provide. The court is to find those facts proved if it is satisfied that they have been proved on the balance of probabilities.

#### PART 4.2 - JUDICIAL NOTICE

Clause 143: Matters of law

251. This clause, as applied by clause 5, makes it unnecessary to adduce evidence in Australian courts of Commonwealth, State and Territory laws, including any Commonwealth, State and Territory subordinate legislation that is published or notified in a government gazette.

Clause 144: Matters of common knowledge

252. This clause makes it unnecessary to adduce evidence about knowledge that is not reasonably open to question and is either common knowledge, either generally or in the locality where the proceeding is being held, or can be verified by consulting authoritative sources.

253. Each party is to be able to make submissions and to refer to information about knowledge covered by the clause.

Clause 145: Certain Crown certificates

254. This clause continues the rules of the common law and equity relating to the effect of a conclusive certificate with respect to a matter of international affairs.

#### PART 4.3 - FACILITATION OF PROOF

Division 1 - General

Clause 146: Evidence produced by processes, machines and other devices

255. The clause applies to a document or thing produced wholly or partly by a device or process, where the party tendering it asserts that in producing the

document or thing the device or process produced a particular outcome. If it is reasonably open to find that the device or process is one that if properly used ordinarily produces that outcome then it is presumed, unless evidence sufficient to raise doubt is adduced, that in producing the document or thing on the occasion in question the device or process produced that outcome.

Clause 147: Documents produced by processes, machines and other devices in the course of business

256. This clause applies to a document produced wholly or partly by a device or process where the party tendering it asserts that in producing the document the device or process produced a particular outcome that is or was at the time used for the purposes of a business. If the document is, or was when produced, a business record, it is presumed, unless evidence sufficient to raise doubt is adduced, that in producing the document on the occasion in question the device or process produced that outcome.

257. This presumption does not apply to a document prepared in connection with a possible proceeding or made in connection with a criminal investigation.

Clause 148: Evidence of certain acts of justices, lawyers and notaries public

258. This clause presumes, unless the contrary is proved, that a document was attested or verified by, or signed or acknowledged before, a justice of the peace, a lawyer or a notary public if an Australian law requires or authorises or permits it to be so attested etc and it purports to have been so attested etc.

Clause 149: Attestation of documents

259. This clause provides that it is not necessary to call a witness who attested a document (other than a testamentary document) to give evidence that the document was signed or attested.

Clause 150: Seals and signatures

260. This clause, as applied by clause 5, sets out presumptions to apply in all Australian courts in relation to official documents that have been sealed or signed. It is presumed, unless the contrary is proved, that a document has been duly sealed which is purportedly sealed by a Royal Great Seal, a seal of the Commonwealth, a State or Territory or a foreign country, an office holder under an Australian or foreign law, a body established by Commonwealth law, Territory law, foreign law or a State court or tribunal, and that a document purportedly signed in his or her official

capacity by an office holder under an Australian or foreign law has been duly signed in that capacity.

**Clause 151: Seals of bodies established under State law**

261. Under this clause it is presumed, unless the contrary is proved, that a document purportedly sealed by a body (other than a court or tribunal), or a body corporate, established by Royal Charter or a law of a State, has been duly sealed. Clause 150 provides for a presumption relating to a document purportedly sealed by a State court or tribunal.

**Clause 152: Documents produced from proper custody**

262. This clause provides that a document more than 20 years old produced from proper custody is presumed, unless the contrary is proved, to be what it purports to be and to have been duly executed or attested.

**Division 2 - Matters of official record**

**Clause 153: Gazettes and other official documents**

263. This clause, as applied by clause 5, provides for the proof in all Australian courts of gazettes and other official documents. It presumes, unless the contrary is proved, that a document purporting to be any government or official gazette of the Commonwealth, a State, a Territory or a foreign country, or to have been printed by a government printer of, or by authority of, the government of the Commonwealth, a State, a Territory or a foreign country is what it purports to be and was published on the day it purports to have been published.

264. Where such a document notifies the doing of an official act, it is presumed, unless the contrary is proved, that the act was duly done and, if the date of the act appears on the document, that it was done on that date.

**Clause 154: Evidence of Parliamentary proceedings**

265. This clause, as applied by clause 5, provides for the proof in all Australian courts of motions, resolutions or proposed laws moved in, agreed to by, or introduced in, the Parliament or a State or Territory legislature, by a document purporting to be a copy of such a motion etc, which has been printed by the appropriate government printer.

**Clause 155: Evidence of official records**

266. This clause, as applied by clause 5, provides that evidence of a document that is a Commonwealth record or a State or Territory public record may be given in all Australian courts by production of a document:

- that purports to be such a record and to be signed or sealed by a Minister of the relevant Government or by a person who, or body that, might reasonably be supposed to have custody of the record; or
- that purports to be a copy of or extract from the record that is certified to be a true copy or extract by a Minister of the relevant Government or by a person who might reasonably be supposed to have custody of the record.

267. On production of such a document, it is presumed, unless evidence sufficient to raise doubt is adduced, that the document is what it purports to be and was duly sealed, signed or certified.

**Clause 156: Public documents**

268. This clause provides a presumption that a document purporting to be a copy of, or an extract from or summary of, a public document and to be sealed or certified as such by a person who might reasonably be supposed to be the custodian of the document is a true copy of, extract from, or summary of, the document.

**Clause 157: Public documents relating to court processes**

269. This clause, as applied by clause 5, provides that evidence may be given in all Australian courts of a public document that is a judgment, act or other process of a court, or a document lodged with a court, by production of a document that purports to be a copy of such a public document and which is proved to be an examined copy, or purports to be sealed with the seal of the court or signed by a judge, magistrate, registrar or other officer of the court.

**Clause 158: Evidence of certain public documents**

270. This clause, as applied by clause 5, provides for the admission in all courts of a public document that is a public record of a State or Territory to the same extent and for the same purpose for which it is admissible under a law of that State or Territory.

It substantially re-enacts sections 8 and 9 of the *State and Territorial Laws and Records Recognition Act 1901*.

Clause 159: Official statistics

271. This clause, as applied by clause 5, provides for the proof of statistics published by the Australian Statistician in all Australian courts. It substantially re-enacts section 10A of the *Evidence Act 1905*.

Division 3 - Matters relating to post and communications

Clause 160: Postal articles

272. This clause presumes, unless evidence sufficient to raise doubt is adduced, that a postal article sent by pre-paid post addressed to a person at a specified address in Australia or an external Territory was received at that address on the fourth working day after posting. A working day does not include a Saturday or Sunday or a public or bank holiday in the place to which the article is addressed.

273. The presumption does not apply in a proceeding between the parties to a contract in relation to the contract if the presumption is inconsistent with a term of that contract.

Clause 161: Telexes

274. This clause presumes, unless evidence sufficient to raise doubt is adduced, that a document purporting to contain a record of a message transmitted by telex was so transmitted, was sent by the person from whom, at the time, and from the place from which, it purports to have been sent and was received at the place to which it purports to have been sent at the time when its transmission to that place was concluded.

275. The presumption does not apply in a proceeding between the parties to a contract in relation to the contract if the presumption is inconsistent with a term of that contract.

Clause 162: Lettergrams and telegrams

276. This clause presumes, unless evidence is sufficient to raise doubt is adduced, that a document purporting to contain a record of a message transmitted by means of a lettergram or telegram was received by the person to whom it was addressed 24 hours after the message was delivered to a post office for transmission.

277. The presumption does not apply in a proceeding between the parties to a contract in relation to the contract if the presumption is inconsistent with a term of that contract.

**Clause 163: Proof of letters having been sent by Commonwealth agencies**

278. This clause, as applied by clause 5, provides for a presumption in all Australian courts that unless evidence sufficient to raise doubt is adduced, a letter from a Commonwealth agency addressed to a person at a specified address was sent by pre-paid post to that address on the fifth business day after the date (if any) that, by reason of its placement on the letter or otherwise, purports to be the date on which the letter was prepared. A business day does not include a Saturday or Sunday, or a public or bank holiday in the place in which the letter was prepared.

#### PART 4.4 - CORROBORATION

**Clause 164: Corroboration requirements abolished**

279. This clause provides that evidence need not be corroborated. However, this clause does not affect any rule of law requiring corroboration with respect to perjury or similar offences. It also abolishes, subject to the other provisions of the Bill, any rules of law or practice that require warnings or directions to be given to a jury about the absence of corroboration.

#### PART 4.5 - WARNINGS

**Clause 165: Unreliable evidence**

280. This clause provides that, where there is a jury and a party requests that a warning be given, the judge is to warn the jury about the possible unreliability of, and the need for caution in determining what weight to give to, evidence that may be unreliable. Evidence that may be unreliable includes:

- most hearsay evidence;
- evidence of an admission;
- identification evidence;
- evidence the reliability of which may be affected by age, ill health or injury;



evidence in a criminal proceeding given by a witness who might be criminally concerned in the events giving rise to the proceeding;

evidence in a criminal proceeding given by a prison informer;

oral evidence of the questioning by a police officer or other investigating official where the questioning is recorded in writing that has not been signed or otherwise acknowledged by the defendant; and

in a proceeding against the estate of a deceased person - evidence given by a person seeking relief about a matter on which the deceased could have given evidence if he or she were alive.

281. The judge need not give a warning if there are good reasons for not doing so.

282. No particular form of words need be used by a judge to give a warning. Other powers of the judge to give a warning to, or to inform, a jury are not affected.

#### PART 4.6 - ANCILLARY PROVISIONS

##### Division 1 - Requests to produce documents or call witnesses

##### Clause 166: Definition of request

283. This clause defines "request" for the purposes of Division 1 of Part 4.6. It means a request that a party makes to another party to:

- produce a document or thing;

be permitted to examine, test or copy a document or thing;

to call as a witness a person to give evidence about the production or maintenance of a document or thing;

to call as a witness a person in whose possession or control a document or thing is believed to be, or to have been;

to be permitted to examine and test certain kinds of document (for example, a computer disk) and the manner in which it was produced and has been kept;

where hearsay evidence is to be tendered - to call as a witness the maker of the hearsay representation;

where evidence of a conviction is to be tendered to prove facts on which it was based - to call as a witness a person who gave evidence at the trial where the conviction occurred.

**Clause 167: Requests may be made about certain matters**

284. This clause provides that a party may make a reasonable request to another party for the purpose of determining a question that relates to a previous representation, evidence of a conviction or the authenticity, identity or admissibility of a document or thing.

**Clause 168: Time limit for making certain requests**

285. This clause enables a party wishing to adduce certain kinds of evidence to require requests to be made before the hearing of the proceeding.

286. A party who receives written notice from another party of that other party's intention to adduce evidence of a previous representation, or of a conviction in order to prove a fact in issue, may only make a request to that other party in relation to the representation or conviction with 21 days after the notice was given.

287. A party who has been served by another party with a copy of a document which that other party intends to tender in evidence may only make a request to that other party in relation to the document within 21 days after service of the copy. If the copy of the document so served is endorsed with or accompanied by a notice stating that the document is to be tendered to prove the contents of another document, the party on whom the copy was served may only make a request to that other party in relation to that other document within 21 days after service of the copy.

288. The court may, in effect, vary the 21 day periods.

**Clause 169: Failure or refusal to comply with requests**

289. This clause provides that if a party without reasonable cause fails or refuses to comply with a request the court may order that the party comply with the request, produce a specified document or thing, or call a specified witness, or that the evidence in relation to which the request was made not be admitted in evidence.

290. If a party fails to comply with an order to comply with a request, to produce a specified document or thing or to call a witness, the court may direct that evidence in relation to which the request was made is not to be admitted into evidence.

Division 2 - Proof of certain matters by affidavits or written statements

Clause 170: Evidence relating to certain matters

291. This clause applies to evidence relevant to the admissibility of evidence to which any of clauses 48 (contents of documents), 69 (business records), 70 (tags and labels), 71 (telecommunications), 146-163 (facilitation of proof) and 182 (Commonwealth records) apply. It enables such evidence to be given by a person permitted to do so under clause 171.

292. Such evidence may be given by affidavit or, if it relates to a public document, by a written statement.

Clause 171: Persons who may give such evidence

293. This clause provides that evidence referred to in clause 170 may be given by a person who had a position of responsibility to making or keeping the relevant document or thing. If it is not reasonably practicable, or would cause undue expense for such a person to give the evidence, the evidence may be given by 'an authorised person', which is defined by the clause to mean certain Australian diplomatic or consular officials, certain AFP officers and other persons authorised by the Attorney-General. However, an authorised person may not give evidence relating to the authenticity of hearsay evidence under clauses 63, 64 or 65.

Clause 172: Evidence based on knowledge, belief or information

294. This clause enables the evidence of a fact in relation to a document or thing to be given on information or on knowledge and belief. An affidavit or statement containing evidence based on knowledge, information or belief must set out the source of the knowledge or information or the basis of the belief.

Clause 173: Notification of other parties

295. This clause provides that a copy of any affidavit or statement in writing, must be served on each other party a reasonable time before the hearing, and the deponent of the affidavit or maker of the statement must be called to give evidence if another party so requests.

### **Division 3 - Foreign law**

#### **Clause 174: Foreign law**

296. This clause provides for proof of a statute, proclamation, regulation, by-law, treaty or act of state of a foreign country. It enables evidence of a statute etc. to be given by producing an examined copy of the statute etc. or certain books or publications which contain the statute etc. or which would be used in the courts of the foreign country to inform the courts about or prove the statute etc.

#### **Clause 175: Evidence of law reports of foreign countries**

297. This clause provides that evidence of the unwritten or common law of a foreign country or of the interpretation of a statute of a foreign country may be adduced by producing law reports of the foreign country that would be used in the courts of that country.

#### **Clause 176: Questions of foreign law to be decided by judge**

298. This clause provides for any question of foreign law to be decided by the judge alone in a proceeding in which there is a jury.

### **Division 4 - Procedures for proving other matters**

#### **Clause 177: Certificates of expert evidence**

299. This clause provides for the admission of expert evidence by tender of a certificate given by an expert setting out his or her opinion.

300. The party tendering the certificate must first have served on each other party written notice and a copy of the certificate not later than 21 days (or other period set by the court) before the hearing of the proceeding.

301. A party so served can require the party intending to tender the certificate to call the person who signed the certificate as a witness in the proceeding. If a party unreasonably requires that the person who signed the certificate be called as a witness the court can make a costs order against that party.

**Clause 178: Convictions, acquittals and other judicial proceedings**

302. This clause provides for evidence of a conviction, acquittal, sentencing or order by, or another judicial proceeding before, an Australian or foreign court to be given by a certificate signed by a judge, magistrate or registrar or other proper officer of the court concerned.

**Clause 179: Proof of identity of convicted persons - affidavits by members of State or Territory police forces**

303. This clause provides for evidence of the identity of a person alleged to have been convicted of an offence in a State or Territory to be given on the basis of fingerprints by an affidavit by a member of the police force of the State or Territory who is a fingerprint expert.

**Clause 180: Proof of identity of convicted persons - affidavits by members of the Australian Federal Police**

304. This clause provides for evidence of the identity of a person alleged to have been convicted of an offence against a law of the Commonwealth to be given on the basis of fingerprints by an affidavit by a member of the Australian Federal Police who is a fingerprint expert.

**Clause 181: Proof of service of statutory notifications, notices, orders and directions**

305. This clause provides for proof of the service, giving or sending, under an Australian law of a written notice, order or direction. Service etc may be proved by the affidavit of the person who served etc the notice etc. The person who made the affidavit may be required to attend for cross-examination.

**CHAPTER 5 - MISCELLANEOUS**

**Clause 182: Application of certain sections in relation to Commonwealth records**

306. This clause provides that the provisions of the Act listed in the Table in the clause which relate to documentary evidence, business records, labels and telecommunications and to presumptions relating to the transmission and delivery of documents, and related ancillary provisions, apply in all proceedings in an Australian court in relation to documents that are or were Commonwealth records.

**Clause 183: Inferences**

307. This clause allows a court to examine a document or thing in respect of which questions have arisen about the application of the Act and to draw reasonable inferences from it.

**Clause 184: Accused may admit matters and give consents**

308. This clause provides that a defendant in a criminal proceeding may, if advised to do so by his or her lawyer, admit matters of fact and give any consent that a party to a civil proceeding may make or give.

**Clause 185: Faith and credit to be given to documents properly authenticated**

309. This clause provides for faith and credit to be given in every court and public office in Australia to the public acts, records and judicial proceedings of a State or Territory. It substantially re-enacts section 18 of the *State and Territorial Laws and Records Recognition Act 1901*.

**Clause 186: Swearing of affidavits before justices of the peace, notaries public and lawyers**

310. This clause enables affidavits for use in court proceedings involving the exercise of federal jurisdiction, or in Territory courts exercising jurisdiction conferred or vested by an Act, to be sworn before any justice of the peace, notary public or lawyer.

**Clause 187: Abolition of the privilege against self-incrimination for bodies corporate**

311. This clause provides that, for the purposes of Commonwealth law, a law of the Australian Capital Territory, a proceeding in a federal court or a court of the Australian Capital Territory, a body corporate does not have a privilege against self-incrimination.

**Clause 188: Impounding documents**

312. This clause enables the court to direct that a document tendered or produced before it (whether or not admitted in evidence) be impounded and kept on such conditions as the court thinks fit.

Clause 189: The voir dire

313. This clause provides for a question whether certain evidence should be admitted, or whether a witness is competent or compellable to be heard, if there is a jury, in the jury's absence.

Clause 190: Waiver of rules of evidence

314. This clause allows the court, with the consent of the parties, to waive the rules relating to the manner of giving evidence, rules relating to the method of proof of documents (or other evidence) and the exclusionary rules.

315. A defendant's consent is not effective in a criminal proceeding unless he or she has been advised to do so by his or her lawyer, or the court is satisfied the defendant understands the consequences of the consent.

316. The clause also enables the court to make such orders in civil proceedings without the consent of the parties if the matter to which the evidence relates is not genuinely in dispute, or if the application of those rules would cause unnecessary expense or delay.

Clause 191: Agreements as to facts

317. The clause applies where the parties to a proceeding have agreed that, for the purposes of the proceeding, a fact is not to be disputed. If the agreement is in writing, signed by or for all the parties or, by leave of the court, stated before the court with the agreement of all parties, evidence may not be adduced to prove, rebut or qualify an agreed fact, unless the court gives leave.

Clause 192: Leave, permission or direction may be given on terms

318. This clause complements provisions of the Bill enabling a court to give leave, permission or a direction. It enables the court to do so on such terms as it thinks fit and sets out matters it must take into account (namely, the effect on the duration of the hearing, any unfairness which may result, the importance of the evidence, the nature of the proceedings, and the court's other powers).

Clause 193: Additional powers

319. This clause provides that a court may make orders to ensure that a party can adequately inspect documents that require interpretation by a qualified person or from which sounds, images or writing can be reproduced.

320. The clause also extends the power of a person or body to make rules of court to making rules in relation to the discovery, exchange, inspection or disclosure of intended evidence, documents and reports of persons intended to be called to give evidence in a proceeding.

Clause 194:

321. This clause contains no substantive provision. Its inclusion ensures parity in section numbering with the New South Wales Evidence Bill 1994.

Clause 195: Prohibited question not to be published

322. This clause provides that a person must not, without express permission of the court, print or publish an improper question that has been disallowed, a question that has been disallowed because its answer would contravene the credibility rule and any question in respect of which leave has been refused under Part 3.7 (which deals with evidence relevant to a witness's credibility). The penalty for contravention of this clause is a fine of 60 penalty units.

Clause 196:

323. This clause contains no substantive provision. Its inclusion ensures parity in section numbering with the New South Wales Evidence Bill 1994.

Clause 197: Regulations

324. This clause enables the Governor-General to make regulations.

SCHEDULE

325. The Schedule sets out the form of oaths to be taken and affirmations to be made by a witness or an interpreter in a proceeding.



## DICTIONARY

## PART 1 - DEFINITIONS

326. Part 1 contains definitions of words used in the Act. The principal definitions are:

'admission' means a previous representation by a party (including a defendant in a criminal proceeding) that is adverse to the party's interest in the outcome of the proceeding.

'Australian court' means a federal court, a State or Territory court, a judge or justice or an arbitrator under Commonwealth, State or Territory law, a person or body authorised by Commonwealth, State or Territory law or consent of parties to receive and examine evidence and a person or body who, in performing a function or exercising a power under a Commonwealth, State or Territory law, is required to apply the laws of evidence. The definition is used for the provisions of the Bill which apply in all courts.

'Commonwealth record' means records made by a Commonwealth Department or House of the Parliament, Commonwealth office holders, bodies established for a public purpose, or a corporation wholly owned by the Commonwealth and kept or maintained by one of those bodies or office holders. Clause 182 provides for several provisions of the Bill to apply in relation to Commonwealth records in proceedings before any Australian court;

'credibility' is defined to include a witness's memory and capacity for observation;

'document' is defined to mean any record of information;

'representation' includes any express or implied representation, one inferred from conduct, one not intended by its maker to be communicated to another and a representation that is not communicated.

## PART 2 - OTHER EXPRESSIONS

327. Part 2 contains definitions of expressions which are used in the Act.

**Part 2(1): References to businesses**

328. This provision defines 'business' to include a profession, calling, occupation, trade or undertaking, an activity carried on by a government or a person holding an office under an Australian or foreign law, and the proceedings of an Australian or foreign legislature.

**Part 2(2): References to examination in chief cross-examination and re-examination**

329. This provision defines examination in chief, cross-examination and re-examination.

**Part 2(3): References to civil penalties**

330. This provision provides that for the purposes of the Act a person is liable to a civil penalty if he or she would be liable in proceedings, other than criminal proceedings, to a penalty, under an Australian law or foreign law.

**Part 2(4): Unavailability of persons**

331. This provision states all the circumstances in which a person is taken not to be available to give evidence about a fact. They include situations where the person can not lawfully give evidence about the fact, can not be found or can not be compelled to attend or to give evidence.

332. The rules relating to the admissibility of hearsay evidence (Part 3.2) depend to a large extent on whether the person who made the hearsay statement is available to give evidence.

**Part 2(5): Unavailability of documents and things**

333. This provision states the circumstances in which a document or thing is taken to be unavailable. The rules relating to proof of contents of documents (Part 2.2) and clause 169 make special provision in relation to documents that are "unavailable".

**Part 2(6): Representations in documents**

334. This provision provides that a representation contained in a document is taken to have been made by a particular person if the person wrote, made or otherwise produced the document or recognised the representation as his or her own by signing or otherwise marking the document.

**Part 2(7): Witnesses**

335. This provision provides that a reference in the Act to a witness includes a party, including a defendant in a criminal proceeding, who is giving evidence.

**Part 2(8): References to documents**

336. This provision provides that a reference in the Act to a document includes a reference to any part, copy, reproduction or duplicate of the document.

**Part 2(9): References to laws**

337. This provision provides in effect that a reference in the Act to a law of a place is a reference to a written or unwritten law of, or in force in, that place.

**Part 2(10): References to children and parents**

338. This provision provides that a reference to a child of a person includes a reference to an adopted or ex-nuptial child of the person and a child living with the person if he or she were a member of the person's household. It also provides that a reference to a parent of a person includes a reference to an adoptive parent and, in the case of a person who is an ex-nuptial child, his or her natural father.









