



Australian Capital Territory

# Evidence Act 2011

A2011-12

**Republication No 3 (RI)**

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Authorised by the ACT Parliamentary Counsel

## About this republication

### The republished law

This is a republication of the *Evidence Act 2011* (including any amendment made under the *Legislation Act 2001*, part 11.3 (Editorial changes)) as in force on 25 November 2013. It also includes any commencement, amendment, repeal or expiry affecting this republished law to 25 November 2013.

The legislation history and amendment history of the republished law are set out in endnotes 3 and 4.

### Kinds of republications

The Parliamentary Counsel's Office prepares 2 kinds of republications of ACT laws (see the ACT legislation register at [www.legislation.act.gov.au](http://www.legislation.act.gov.au)):

- authorised republications to which the *Legislation Act 2001* applies
- unauthorised republications.

The status of this republication appears on the bottom of each page.

### Editorial changes

The *Legislation Act 2001*, part 11.3 authorises the Parliamentary Counsel to make editorial amendments and other changes of a formal nature when preparing a law for republication. Editorial changes do not change the effect of the law, but have effect as if they had been made by an Act commencing on the republication date (see *Legislation Act 2001*, s 115 and s 117). The changes are made if the Parliamentary Counsel considers they are desirable to bring the law into line, or more closely into line, with current legislative drafting practice.

This republication does not include amendments made under part 11.3 (see endnote 1).

### Uncommenced provisions and amendments

If a provision of the republished law has not commenced, the symbol **U** appears immediately before the provision heading. Any uncommenced amendments that affect this republished law are accessible on the ACT legislation register ([www.legislation.act.gov.au](http://www.legislation.act.gov.au)). For more information, see the home page for this law on the register.

### Modifications

If a provision of the republished law is affected by a current modification, the symbol **M** appears immediately before the provision heading. The text of the modifying provision appears in the endnotes. For the legal status of modifications, see the *Legislation Act 2001*, section 95.

### Penalties

At the republication date, the value of a penalty unit for an offence against this law is \$140 for an individual and \$700 for a corporation (see *Legislation Act 2001*, s 133).



Australian Capital Territory

# Evidence Act 2011

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Australian Capital Territory

# Evidence Act 2011

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An Act about the law of evidence

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## Chapter 1 Preliminary

*Note 1* *Introductory note*

This Act sets out the Territory rules of evidence. Generally speaking, the Act applies to proceedings in ACT courts and before other people or bodies required to apply the laws of evidence (see s 4).

*Note 2* *Related legislation*

This Act is in most respects uniform with the *Evidence Act 1995* (Cwlth) (the *Commonwealth Act*) and the *Evidence Act 1995* (NSW) (the *NSW Act*). The Acts are drafted in identical terms except so far as differences are identified by appropriate annotations to the texts, and except so far as minor drafting variations are required to accord with the drafting style of each jurisdiction.

## Part 1.1 Formal matters

### 1 Name of Act

This Act is the *Evidence Act 2011*.

### 3 Dictionary

The dictionary at the end of this Act is part of this Act.

*Note 1* The dictionary at the end of this Act defines certain terms used in this Act, and includes references (*signpost definitions*) to other terms defined elsewhere.

For example, the signpost definition ‘*Commonwealth record*—see the *Evidence Act 1995* (Cwlth), dictionary.’ means that the term ‘Commonwealth record’ is defined in that dictionary and the definition applies to this Act.

*Note 2* A definition in the dictionary (including a signpost definition) applies to the entire Act unless the definition, or another provision of the Act, provides otherwise or the contrary intention otherwise appears (see [Legislation Act](#), s 155 and s 156 (1)).

*Note 3* This section differs from the [Commonwealth Act](#) and [NSW Act](#).



### 3A Numbering

- (1) To maintain consistent section numbering between this Act and the [Commonwealth Act](#)—
  - (a) if the [Commonwealth Act](#) contains a section that is not included in this Act—the section number and heading appearing in the [Commonwealth Act](#) are included in this Act despite the omission of the body of the section; and
  - (b) if this Act contains a section that is not included in the [Commonwealth Act](#)—the section is numbered so as to maintain consistency in numbering between sections common to both Acts.
- (2) A section number and heading mentioned in subsection (1) (a) form part of this Act.
- (3) If a provision of this Act (other than a section) is numbered differently from the equivalent provision of the [Commonwealth Act](#), the provision of this Act may be referred to using the number of the equivalent provision of the [Commonwealth Act](#).

*Note 1* A note appears under each heading mentioned in s (1) (a) describing the omitted section of the [Commonwealth Act](#).

*Note 2* A note appears under each section mentioned in s (1) (b) highlighting the non-appearance of an equivalent section in the [Commonwealth Act](#).

*Note 3* The [Commonwealth Act](#) and [NSW Act](#) do not include this section.

### 3B Notes

A note included in this Act is explanatory and is not part of this Act.

*Note 1* See the [Legislation Act](#), s 127 (1), (4) and (5) for the legal status of notes.

*Note 2* The [Commonwealth Act](#) and [NSW Act](#) do not include this section.

## Part 1.2 Application of this Act

### 4 Courts and proceedings to which Act applies

- (1) This Act applies to all proceedings in an ACT court, including proceedings that—
  - (a) relate to bail; or
  - (b) are interlocutory proceedings or proceedings of a similar kind; or
  - (c) are heard in chambers; or
  - (d) subject to subsection (2), relate to sentencing.
- (2) If a proceeding relates to sentencing—
  - (a) this Act applies only if the court directs that the law of evidence applies in the proceeding; and
  - (b) if the court states in the direction that the law of evidence applies only in relation to stated matters—the direction has effect accordingly.
- (3) The court must make a direction under this section if—
  - (a) a party to the proceeding applies for the direction in relation to the proof of a fact; and
  - (b) in the court's opinion, the proceeding involves proof of the fact, and the fact is or will be significant in deciding a sentence to be imposed in the proceeding.
- (4) The court must make a direction under this section if the court considers it appropriate in the interests of justice.

*Note* This section differs from the [Commonwealth Act](#), s 4.

## 5 Extended application of certain provisions

*Note* The [Commonwealth Act](#) includes a provision extending the application of stated provisions of the [Commonwealth Act](#) to proceedings in all Australian courts.

## 6 Territories

*Note* The [Commonwealth Act](#) includes a provision extending that Act to each external territory.

## 7 Act binds Crown

*Note* The [Commonwealth Act](#) and [NSW Act](#) include a provision binding the Crown. The provision is unnecessary in the ACT (see [Legislation Act](#), s 121).

## 8 Operation of other Acts

This Act does not affect the operation of the provisions of any other Act.

### Examples

1 [Bail Act 1992](#), s 19 (2)

2 [Evidence \(Miscellaneous Provisions\) Act 1991](#), pt 5

*Note 1* This section differs from the [Commonwealth Act](#), s 8. Differences include additional subsections relating to the operation of the [Corporations Act](#) and the [Australian Securities and Investments Commission Act 2001](#) (Cwlth).

*Note 2* An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see [Legislation Act](#), s 126 and s 132).

## 8A Offences against Act—application of Criminal Code etc

Other legislation applies in relation to offences against this Act.

*Note 1 Criminal Code*

The [Criminal Code](#), ch 2 applies to all offences against this Act (see Code, pt 2.1).

The chapter sets out the general principles of criminal responsibility (including burdens of proof and general defences), and defines terms used for offences to which the Code applies (eg *conduct*, *intention*, *recklessness* and *strict liability*).

*Note 2 Penalty units*

The [Legislation Act](#), s 133 deals with the meaning of offence penalties that are expressed in penalty units.

*Note 3* This section differs from the [Commonwealth Act](#), s 8A.

## 9 Application of common law and equity

- (1) This Act does not affect the operation of a principle or rule of common law or equity in relation to evidence in a proceeding to which this Act applies, except so far as this Act provides otherwise expressly or by necessary intendment.
- (2) Without limiting subsection (1), this Act does not affect the operation of a principle or rule mentioned in subsection (1) so far as it relates to any of the following:
  - (a) admission or use of evidence of reasons for a decision of a member of a jury, or of the deliberations of a member of a jury in relation to the decision, in a proceeding by way of appeal from a judgment, decree, order or sentence of a court;
  - (b) the operation of a legal or evidential presumption that is not inconsistent with this Act;

- (c) a court's power to dispense with the operation of a rule of evidence or procedure in an interlocutory proceeding.

*Note* This section differs from the [Commonwealth Act](#), s 9. That section preserves the written and unwritten laws of States and Territories in relation to certain matters.

## **10 Parliamentary privilege preserved**

- (1) This Act does not affect the law relating to the privileges of any Australian Parliament or any house of any Australian Parliament.
- (2) In particular, section 15 (2) (Compellability—Sovereign and others) does not affect, and is in addition to, the law relating to those privileges.

## **11 General powers of a court**

- (1) The power of a court to control the conduct of a proceeding is not affected by this Act, except so far as this Act provides otherwise expressly or by necessary intendment.
- (2) In particular, the powers of a court in relation to abuse of process in a proceeding are not affected.

## **Chapter 2 Giving and presenting evidence**

- Note* This chapter is about ways in which evidence is given and presented.
- Pt 2.1 is about evidence from witnesses.
  - Pt 2.2 is about documentary evidence.
  - Pt 2.3 is about other forms of evidence.

### **Part 2.1 Witnesses**

#### **Division 2.1.1 Competence and compellability of witnesses**

##### **12 Competence and compellability**

Except as otherwise provided by this Act—

- (a) every person is competent to give evidence; and
- (b) a person who is competent to give evidence about a fact is compellable to give that evidence.

##### **13 Competence—lack of capacity**

- (1) A person is not competent to give evidence about a fact if, for any reason (including a mental, intellectual or physical disability)—
  - (a) the person does not have the capacity to understand a question about the fact; or
  - (b) the person does not have the capacity to give an answer that can be understood to a question about the fact;

and that incapacity cannot be overcome.

- Note* See s 30 and s 31 for examples of assistance that may be provided to enable witnesses to overcome disabilities.

- (2) A person who, because of subsection (1), is not competent to give evidence about a fact may be competent to give evidence about other facts.
- (3) A person who is competent to give evidence about a fact is not competent to give sworn evidence about the fact if the person does not have the capacity to understand that, in giving evidence, the person is under an obligation to give truthful evidence.
- (4) A person who is not competent to give sworn evidence about a fact may, subject to subsection (5), be competent to give unsworn evidence about the fact.
- (5) A person who, because of subsection (3), is not competent to give sworn evidence is competent to give unsworn evidence if the court has told the person that—
  - (a) it is important to tell the truth; and
  - (b) the person may be asked questions that the person does not know, or cannot remember, the answer to, and that the person should tell the court if this happens; and
  - (c) the person may be asked questions that suggest certain statements are true or untrue and that the person should agree with the statements that the person believes are true and should feel no pressure to agree with statements that the person believes are untrue.
- (6) It is presumed, unless the contrary is proved, that a person is not incompetent because of this section.
- (7) Evidence that has been given by a witness does not become inadmissible only because, before the witness finishes giving evidence, the witness dies or ceases to be competent to give evidence.

- (8) For the purpose of deciding a question arising under this section, the court may inform itself as it thinks fit, including by obtaining information from a person who has relevant specialised knowledge based on the person's training, study or experience.

**14 Compellability—reduced capacity**

A person is not compellable to give evidence on a particular matter if the court is satisfied that—

- (a) substantial cost or delay would be incurred in ensuring that the person would have the capacity to understand a question about the matter or to give an answer that can be understood to a question about the matter; and
- (b) adequate evidence on the matter has been given, or will be able to be given, from 1 or more other people or sources.

**15 Compellability—Sovereign and others**

- (1) None of the following is compellable to give evidence:
- (a) the Sovereign;
  - (b) the Governor-General;
  - (c) the Governor of a State;
  - (d) the Administrator of a Territory;
  - (e) a foreign sovereign or the Head of State of a foreign country.
- (2) A member of a house of an Australian Parliament is not compellable to give evidence if the member would, if compelled to give evidence, be prevented from attending—
- (a) a sitting of the house or a joint sitting of the Parliament; or
  - (b) if the member is a member of a committee of the house or the Parliament—a meeting of the committee.



**16 Competence and compellability—judges and jurors**

- (1) A person who is a judge or juror in a proceeding is not competent to give evidence in the proceeding.
- (2) However, a juror is competent to give evidence in the proceeding about matters affecting conduct of the proceeding.
- (3) A person who is or was a judge in an Australian or overseas proceeding is not compellable to give evidence about the proceeding unless the court gives leave.

**17 Competence and compellability—defendants in criminal proceedings**

- (1) This section applies only in a criminal proceeding.
- (2) A defendant is not competent to give evidence as a witness for the prosecution.
- (3) An associated defendant is not compellable to give evidence for or against a defendant in a criminal proceeding unless the associated defendant is being tried separately from the defendant.
- (4) If a witness is an associated defendant who is being tried jointly with the defendant in the proceeding, the court must satisfy itself (if there is a jury, in the jury's absence) that the witness is aware of the effect of subsection (3).

*Note* *Associated defendant*—see the dictionary.

**18 Compellability of domestic partners and others in criminal proceedings generally**

- (1) This section applies only in a criminal proceeding.
- (2) A person who, when required to give evidence, is the domestic partner, parent or child of a defendant may object to being required—
  - (a) to give evidence; or

(b) to give evidence of a communication between the person and the defendant;

as a witness for the prosecution.

- (3) The objection must be made before the person gives the evidence or as soon as practicable after the person becomes aware of the right to object, whichever is the later.
- (4) If it appears to the court that a person may have a right to make an objection under this section, the court must satisfy itself that the person is aware of the effect of this section as it may apply to the person.
- (5) If there is a jury, the court must hear and decide any objection under this section in the jury's absence.
- (6) A person who makes an objection under this section to giving evidence or giving evidence of a communication must not be required to give the evidence if the court finds that—
- (a) there is a likelihood that harm would or might be caused (whether directly or indirectly) to the person, or to the relationship between the person and the defendant, if the person gives the evidence; and
  - (b) the nature and extent of that harm outweighs the desirability of having the evidence given.
- (7) Without limiting the matters that may be taken into account by the court for subsection (6), it must take into account the following:
- (a) the nature and gravity of the offence for which the defendant is being prosecuted;
  - (b) the substance and importance of any evidence that the person might give and the weight that is likely to be attached to it;
  - (c) whether any other evidence about the matters to which the evidence of the person would relate is reasonably available to the prosecutor;

- (d) the nature of the relationship between the defendant and the person;
  - (e) whether, in giving the evidence, the person would have to disclose matter that was received by the person in confidence from the defendant.
- (8) If an objection under this section has been decided, the prosecutor may not comment on—
- (a) the objection; or
  - (b) the decision of the court in relation to the objection; or
  - (c) the failure of the person to give evidence.

**19 Compellability of domestic partners and others in certain criminal proceedings**

Section 18 does not apply in a proceeding for an offence against or mentioned in the following provisions:

- (a) an offence against the *Crimes Act 1900*, parts 2 to 5, that is an offence against a person under 16 years old;
- (b) an offence against the following provisions of the *Children and Young People Act 2008*:
  - (i) section 423 (Offence—contravene care and protection order);
  - (ii) section 789 (Offence—contravene employment prohibition notice);
  - (iii) section 791 (Offence—contravene employment conditions notice);
  - (iv) section 803 (Offence—employment of child or young person under 15 years old in high risk employment);
  - (v) section 804 (Offence—contravene condition of permit);

- (c) an offence that is a domestic violence offence within the meaning of the *Domestic Violence and Protection Orders Act 2008*.

*Note* This section differs from the [Commonwealth Act](#) and [NSW Act](#), s 19.

## **20 Comment on failure to give evidence**

- (1) This section applies only in a criminal proceeding for an indictable offence.
- (2) The judge or any party (other than the prosecutor) may comment on a failure of a defendant to give evidence.
- (3) However, unless the comment is made by another defendant in the proceeding, the comment must not suggest that the defendant failed to give evidence because the defendant was, or believed that the defendant was, guilty of the offence.
- (4) The judge or any party (other than the prosecutor) may comment on a failure to give evidence by a person who, at the time of the failure, was—
  - (a) the defendant’s domestic partner; or
  - (b) a parent or child of the defendant.
- (5) However, unless the comment is made by another defendant in the proceeding, a comment mentioned in subsection (4) must not suggest that the domestic partner, parent or child failed to give evidence because—
  - (a) the defendant was guilty of the offence; or
  - (b) the domestic partner, parent or child believed that the defendant was guilty of the offence.
- (6) If—
  - (a) 2 or more people are being tried together for an indictable offence; and

- (b) comment is made by any of them on the failure of any of them or of the domestic partner, or a parent or child, of any of them to give evidence;

the judge may, in addition to commenting on the failure to give evidence, comment on any comment mentioned in paragraph (b).

## **Division 2.1.2 Oaths and affirmations**

### **21 Sworn evidence of witnesses to be on oath or affirmation**

- (1) A witness in a proceeding must take an oath or make an affirmation before giving evidence.
- (2) Subsection (1) does not apply to a person who gives unsworn evidence under section 13 (Competence—lack of capacity).
- (3) A person who is called only to produce a document or thing to the court need not take an oath or make an affirmation before doing so.
- (4) The witness must take the oath, or make the affirmation, in accordance with the appropriate form in schedule 1 or in a similar form.
- (5) An affirmation has the same effect for all purposes as an oath.

### **22 Interpreters to act on oath or affirmation**

- (1) A person must take an oath or make an affirmation before acting as an interpreter in a proceeding.
- (2) An oath taken, or an affirmation made, by a person before acting as an interpreter on a day is taken for subsection (1) to be an oath taken or affirmation made by the person for the purposes of any subsequent proceeding in the court on the day the person acts as an interpreter.
- (3) The person must take the oath, or make the affirmation, in accordance with the appropriate form in schedule 1 or in a similar form.

- (4) An affirmation has the same effect for all purposes as an oath.

*Note* The [Commonwealth Act](#) does not include s (2).

### **23 Choice of oath or affirmation**

- (1) 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.
- (2) The court must tell the person that the person has this choice, unless the court is satisfied that the person has already been told or knows about having the choice.
- (3) The court may direct a person who is to be a witness to make an affirmation if—
- (a) the person refuses to choose whether to take an oath or make an affirmation; or
  - (b) it is not reasonably practicable for the person to take an appropriate oath.

*Note* Subsection (2) differs from the [Commonwealth Act](#), s 23.

### **24 Requirements for oaths**

- (1) It is not necessary that a religious text be used in taking an oath.
- (2) An oath is effective for this division even if the person who took it—
- (a) did not have a religious belief or did not have a religious belief of a particular kind; or
  - (b) did not understand the nature and consequences of the oath.

**24A Alternative oath**

- (1) A person may take an oath even if the person's religious or spiritual beliefs do not include a belief in the existence of a god.
- (2) Despite anything to the contrary in this Act, the form of oath taken by a person—
  - (a) need not include a reference to a god; and
  - (b) may instead refer to the basis of the person's beliefs in accordance with a form prescribed by regulation.

*Note* The [Commonwealth Act](#) does not include an equivalent provision to s 24A.

**Division 2.1.3 General rules about giving evidence**

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

The court may make the orders it considers just in relation to—

- (a) the way in which witnesses are to be questioned; and
- (b) the production and use of documents and things in connection with the questioning of witnesses; and
- (c) the order in which parties may question a witness; and
- (d) the presence and behaviour of any person in connection with the questioning of witnesses.

**27 Parties may question witnesses**

Except as provided by this Act, a party may question any witness.

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

Unless the court otherwise directs—

- (a) cross-examination of a witness must not take place before the examination-in-chief of the witness; and
- (b) re-examination of a witness must not take place before all other parties who wish to do so have cross-examined the witness.

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

- (1) A party may question a witness in any way the party thinks fit, except as provided by this chapter or as directed by the court.
- (2) The court may, on its own motion or on the application of the party that called the witness, direct that the witness give evidence completely or partly in narrative form.
- (3) The direction may include directions about the way in which evidence is to be given in that form.
- (4) Evidence may be given in the form of charts, summaries or other explanatory material if it appears to the court that the material would be likely to aid its comprehension of other evidence that has been given or is to be given.

**30 Interpreters**

A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.



### **31 Deaf and mute witnesses**

- (1) A witness who cannot hear adequately may be questioned in any appropriate way.
- (2) A witness who cannot speak adequately may give evidence by any appropriate means.
- (3) The court may give directions about either or both of the following:
  - (a) the way in which a witness may be questioned under subsection (1);
  - (b) the means by which a witness may give evidence under subsection (2).
- (4) This section does not affect the right of a witness to whom this section applies to give evidence about a fact through an interpreter under section 30.

### **32 Attempts to revive memory in court**

- (1) A witness must not, in the course of giving evidence, use a document to try to revive the witness's memory about a fact or opinion unless the court gives leave.
- (2) Without limiting the matters that the court may take into account in deciding whether to give leave, it must take into account—
  - (a) whether the witness will be able to recall the fact or opinion adequately without using the document; and
  - (b) whether the part of the document that the witness proposes to use is, or is a copy of, a document that—
    - (i) was written or made by the witness when the events recorded in it were fresh in the witness's memory; or
    - (ii) was, at that time, found by the witness to be accurate.

- (3) If a witness has, while giving evidence, used a document to try to revive the witness's memory about a fact or opinion, the witness may, with the leave of the court, read aloud, as part of the witness's evidence, the part of the document that relates to the fact or opinion.
- (4) The court must, on the request of a party, give the directions the court thinks fit to ensure that the part of the document that relates to the proceeding is produced to the party.

### **33 Evidence given by police officers**

- (1) Despite section 32, 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 the police officer.
- (2) Evidence may not be given in that way unless—
  - (a) the statement was made by the police officer at the time of or soon after the events mentioned in the statement happened; and
  - (b) the police officer signed the statement when it was made; and
  - (c) a copy of the statement had been given to the person charged or to the person's Australian legal practitioner or legal counsel a reasonable time before the hearing of the evidence for the prosecution.
- (3) A reference in this section to a police officer includes a reference to a person who was a police officer at the time the statement was made.

### **34 Attempts to revive memory out of court**

- (1) The court may, on the request of a party, give the directions that are appropriate to ensure that stated documents and things used by a witness otherwise than while giving evidence to try to revive the witness's memory are produced to the party for the purposes of the proceeding.

- (2) The court may refuse to admit the evidence given by the witness so far as it concerns a fact about which the witness tried to revive the witness's memory if, without reasonable excuse, the directions have not been complied with.

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

- (1) A party must not be required to tender a document only because the party, whether under this Act or otherwise—
- (a) called for the document to be produced to the party; or
  - (b) inspected it when it was produced.
- (2) The party who produces a document called for is not entitled to tender it only because the party to whom it was produced, or who inspected it, fails to tender it.

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

- (1) The court may order a person who—
- (a) is present at the hearing of a proceeding; and
  - (b) is compellable to give evidence in the proceeding;
- to give evidence and to produce documents or things even if a subpoena or other process requiring the person to attend for that purpose has not been served on the person.
- (2) A person ordered to give evidence or to produce documents or things is subject to the same penalties and liabilities as if the person had been served with a subpoena or other process.
- (3) A party who inspects a document or thing produced to the court because of subsection (1) need not use the document in evidence.

## Division 2.1.4 Examination-in-chief and re-examination

### 37 Leading questions

- (1) A leading question must not be put to a witness in examination-in-chief or in re-examination unless—
  - (a) the court gives leave; or
  - (b) the question relates to a matter introductory to the witness's evidence; or
  - (c) no objection is made to the question and (leaving aside the party conducting the examination-in-chief or re-examination) each other party to the proceeding is represented by an Australian legal practitioner, legal counsel or prosecutor; or
  - (d) the question relates to a matter that is not in dispute; or
  - (e) if the witness has specialised knowledge based on the witness's training, study or experience—the question is asked for the purpose of obtaining the witness's opinion about a hypothetical statement of facts about which evidence has been, or is intended to be, given.
- (2) Unless the court otherwise directs, subsection (1) does not apply in a civil proceeding to a question that relates to an investigation, inspection or report that the witness made in the course of carrying out public or official duties.
- (3) Subsection (1) does not prevent the court from exercising power under rules of court to allow a written statement or report to be tendered or treated as evidence-in-chief of its maker.

*Note* **Leading question**—see the dictionary.

### **38 Unfavourable witnesses**

- (1) A party who called a witness may, with the leave of the court, question the witness, as though the party were cross-examining the witness, about—
  - (a) evidence given by the witness that is unfavourable to the party; or
  - (b) a matter of which the witness may reasonably be supposed to have knowledge and about which it appears to the court the witness is not, in examination-in-chief, making a genuine attempt to give evidence; or
  - (c) whether the witness has, at any time, made a prior inconsistent statement.
- (2) Questioning a witness under this section is taken to be cross-examination for this Act (other than section 39 (Limits on re-examination)).
- (3) The party questioning the witness under this section may, with the leave of the court, question the witness about matters relevant only to the witness's credibility.

*Note* The rules about admissibility of evidence relevant only to credibility are set out in pt 3.7.

- (4) Questioning under this section must take place before the other parties cross-examine the witness, unless the court otherwise directs.
- (5) If the court gives a direction under subsection (4), the order in which the parties question the witness must be as the court directs.
- (6) Without limiting the matters that the court may take into account in deciding whether to give leave or a direction under this section, it must take into account—
  - (a) whether the party gave notice at the earliest opportunity of the party's intention to seek leave; and

- (b) the matters on which, and the extent to which, the witness has been, or is likely to be, questioned by another party.
- (7) A party is subject to the same liability to be cross-examined under this section as any other witness if—
  - (a) a proceeding is being conducted in the name of the party by or on behalf of an insurer or someone else; and
  - (b) the party is a witness in the proceeding.

### 39 Limits on re-examination

On re-examination—

- (a) a witness may be questioned about matters arising out of evidence given by the witness in cross-examination; and
- (b) other questions may not be put to the witness unless the court gives leave.

## Division 2.1.5 Cross-examination

### 40 Witness called in error

A party must not cross-examine a witness who has been called in error by another party and has not been questioned by the other party about a matter relevant to a question to be decided in the proceeding.

### 41 Improper questions

- (1) The court must disallow a question put to a witness in cross-examination, or tell the witness that it need not be answered, if the court is of the opinion that the question (a *disallowable question*)—
  - (a) is misleading or confusing; or
  - (b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; or

- (c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate; or
- (d) has no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability).

*Note* An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see [Legislation Act](#), s 126 and s 132).

- (2) Without limiting the matters the court may take into account for subsection (1), it must take into account—
  - (a) any relevant condition or characteristic of the witness of which the court is, or is made, aware, including age, education, ethnic and cultural background, gender, language background and skills, level of maturity and understanding and personality; and
  - (b) any mental, intellectual or physical disability of which the court is, or is made, aware and to which the witness is, or appears to be, subject; and
  - (c) the context in which the question is put, including—
    - (i) the nature of the proceeding; and
    - (ii) in a criminal proceeding—the nature of the offence to which the proceeding relates; and
    - (iii) the relationship (if any) between the witness and any other party to the proceeding.
- (3) A question is not a disallowable question only because—
  - (a) the question challenges the truthfulness of the witness or the consistency or accuracy of any statement made by the witness; or
  - (b) the question requires the witness to discuss a subject that could be considered distasteful to, or private by, the witness.

- (4) A party may object to a question put to a witness on the ground that it is a disallowable question.
- (5) However, the duty imposed on the court by this section applies whether or not an objection is raised to a particular question.
- (6) A failure by the court to disallow a question under this section, or to tell the witness that it need not be answered, does not affect the admissibility in evidence of any answer given by the witness in response to the question.

*Note* A person must not, without the express permission of the court, print or publish any question that the court has disallowed under this section (see s 195).

## **42 Leading questions**

- (1) 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.
- (2) Without limiting the matters that the court may take into account in deciding whether to disallow the question or give a direction, it must take into account the extent to which—
  - (a) evidence that has been given by the witness in examination-in-chief is unfavourable to the party who called the witness; and
  - (b) the witness has an interest consistent with an interest of the cross-examiner; and
  - (c) the witness is sympathetic to the party conducting the cross-examination, either generally or about a particular matter; and
  - (d) the witness's age, or any mental, intellectual or physical disability to which the witness is subject, may affect the witness's answers.



- (3) The court must disallow the question, or direct the witness not to answer it, if the court is satisfied that the facts would be better ascertained if leading questions were not used.
- (4) This section does not limit the court's power to control leading questions.

*Note* **Leading question**—see the dictionary.

### **43 Prior inconsistent statements of witnesses**

- (1) A witness may be cross-examined about a prior inconsistent statement alleged to have been made by the witness whether or not—
  - (a) complete particulars of the statement have been given to the witness; or
  - (b) a document containing a record of the statement has been shown to the witness.
- (2) If, in cross-examination, a witness does not admit that the witness has made a prior inconsistent statement, the cross-examiner must not present evidence of the statement otherwise than from the witness unless, in the cross-examination, the cross-examiner—
  - (a) told the witness enough of the circumstances of the making of the statement to enable the witness to identify the statement; and
  - (b) drew the witness's attention to the part of the statement that is inconsistent with the witness's evidence.
- (3) For the purpose of presenting evidence of the statement, a party may re-open the party's case.

#### 44 Previous representations of other people

- (1) Except as provided by this section, a cross-examiner must not question a witness about a previous representation alleged to have been made by a person other than the witness.
- (2) A cross-examiner may question a witness about the representation and its contents if—
  - (a) evidence of the representation has been admitted; or
  - (b) the court is satisfied that it will be admitted.
- (3) If subsection (2) does not apply and the representation is contained in a document, the document may only be used to question a witness as follows:
  - (a) the document must be produced to the witness;
  - (b) if the document is a tape recording, or any other kind of document from which sounds are reproduced—the witness must be provided with the means (for example, headphones) to listen to the contents of the document without other people present at the cross-examination hearing the contents;

*Note* An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see [Legislation Act](#), s 126 and s 132).
  - (c) the witness must be asked whether, having examined (or heard) the contents of the document, the witness stands by the evidence that the witness has given;
  - (d) neither the cross-examiner nor the witness may identify the document or disclose any of its contents.
- (4) A document used in a way mentioned in subsection (3) may be marked for identification.

**45 Production of documents**

- (1) This section applies if a party is cross-examining or has cross-examined a witness about—
  - (a) a prior inconsistent statement alleged to have been made by the witness that is recorded in a document; or
  - (b) a previous representation alleged to have been made by someone else that is recorded in a document.
- (2) If the court orders or if another party requires, the party must produce to the court or to the other party—
  - (a) the document; or
  - (b) evidence of the contents of the document that is available to the party.
- (3) The court may—
  - (a) examine a document or evidence that has been produced under subsection (2); and
  - (b) give directions as to its use; and
  - (c) admit it even if it has not been tendered by a party.
- (4) Subsection (3) does not permit the court to admit a document or evidence that is not admissible because of chapter 3.
- (5) The mere production of a document to a witness who is being cross-examined does not give rise to a requirement that the cross-examiner tender the document.

**46 Leave to recall witnesses**

- (1) The court may give leave to a party to recall a witness to give evidence about a matter raised by evidence presented by another party, and on which the witness was not cross-examined, if the evidence has been admitted and—
  - (a) it contradicts evidence about the matter given by the witness in examination-in-chief; or
  - (b) the witness could have given evidence about the matter in examination-in-chief.
- (2) A reference in this section to a matter raised by evidence presented by another party includes a reference to an inference drawn from, or that the party intends to draw from, the evidence.

## Part 2.2 Documents

### 47 Definitions—pt 2.2

- (1) For this part, a *document in question* is a document as to the contents of which it is sought to present evidence.
- (2) For this part, a reference to a copy of a document in question includes a reference to a document that is not an exact copy of the document in question but that is identical to the document in question in all relevant respects.

### 48 Proof of contents of documents

- (1) A party may present evidence of the contents of a document in question by tendering the document in question or by any 1 or more of the following methods:
  - (a) presenting evidence of an admission made by another party to the proceeding as to the contents of the document in question;
  - (b) tendering a document that—
    - (i) is or purports to be a copy of the document in question; and
    - (ii) has been produced, or purports to have been produced, by a device that reproduces the contents of documents;
  - (c) if the document in question is an article or thing by which words are recorded in a way as to be capable of being reproduced as sound, or in which words are recorded in a code (including shorthand writing)—tendering a document that is or purports to be a transcript of the words;

- (d) if the document in question is an article or thing on or in which information is stored in a way that it cannot be used by the court unless a device is used to retrieve, produce or collate it—tendering a document that was or purports to have been produced by use of the device;
  - (e) tendering a document that—
    - (i) forms part of the records of or kept by a business (whether or not the business is still in existence); and
    - (ii) is or purports to be a copy of, or an extract from or a summary of, the document in question, or is or purports to be a copy of the extract or summary;
  - (f) if the document in question is a public document—tendering a document that is or purports to be a copy of the document in question and that is or purports to have been printed—
    - (i) by the government printer or the government or official printer of the Commonwealth, a State or another Territory; or
    - (ii) by authority of the government of the Territory, the Commonwealth, a State, another Territory or a foreign country; or
    - (iii) by authority of an Australian Parliament, a house of an Australian Parliament or a committee of an Australian Parliament.
- (2) Subsection (1) applies to a document in question whether the document in question is available to the party or not.
- (3) If the party presents evidence of the contents of a document under subsection (1) (a), the evidence may only be used—
- (a) in relation to the party's case against the other party who made the admission; or

- (b) in relation to the other party's case against the party who presented the evidence in that way.
- (4) A party may present evidence of the contents of a document in question that is not available to the party, or the existence and contents of which are not in issue in the proceeding, by—
  - (a) tendering a document that is a copy of, or an extract from or summary of, the document in question; or
  - (b) presenting evidence from a witness of the contents of the document in question.

*Note 1* The dictionary, pt 2, s 5 is about the availability of documents.

*Note 2* The [Commonwealth Act](#), s 182 gives the [Commonwealth Act](#), s 48 a wider application in relation to Commonwealth records and certain Commonwealth documents.

## **49 Documents in foreign countries**

No paragraph of section 48 (1) (other than paragraph (a)) applies to a document that is in a foreign country unless—

- (a) the party who presents evidence of the contents of the document in question has, not less than 28 days (or any other period prescribed by regulation or by rules of court) before the day on which the evidence is presented, served on each other party a copy of the document proposed to be tendered; or
- (b) the court directs that it must apply.

*Note* The [Commonwealth Act](#), s 182 gives the [Commonwealth Act](#), s 49 a wider application in relation to Commonwealth records and certain Commonwealth documents.

## 50 Proof of voluminous or complex documents

- (1) The court may, on the application of a party, direct that the party may present evidence of the contents of 2 or more documents in question in the form of a summary if the court is satisfied that it would not otherwise be possible conveniently to examine the evidence because of the volume or complexity of the documents in question.
- (2) The court may only make a direction under subsection (1) if the party seeking to present the evidence in the form of a summary has—
  - (a) served on each other party a copy of the summary that discloses the name and address of the person who prepared the summary; and
  - (b) given each other party a reasonable opportunity to examine or copy the documents in question.
- (3) The opinion rule does not apply to evidence presented in accordance with a direction under this section.

## 51 Original document rule abolished

The principles and rules of common law that relate to the means of proving the contents of documents are abolished.

*Note* The [Commonwealth Act](#), s 182 gives the provisions of the [Commonwealth Act](#), pt 2.2 a wider application in relation to Commonwealth records and certain Commonwealth documents.



## **Part 2.3                      Other evidence**

### **52                      Presenting of other evidence not affected**

This Act (other than this part) does not affect the operation of any Australian law or rule of practice so far as it permits evidence to be presented in a way other than by witnesses giving evidence or documents being tendered in evidence.

### **53                      Views**

- (1) A judge may, on application, order that a demonstration, experiment or inspection be held.
- (2) A judge must not make an order unless satisfied that—
  - (a) the parties will be given a reasonable opportunity to be present; and
  - (b) the judge and, if there is a jury, the jury will be present.
- (3) Without limiting the matters that the judge may take into account in deciding whether to make an order, the judge must take into account the following:
  - (a) whether the parties will be present;
  - (b) whether the demonstration, experiment or inspection will, in the court's opinion, assist the court in resolving issues of fact or understanding the evidence;
  - (c) the danger that the demonstration, experiment or inspection might be unfairly prejudicial, might be misleading or confusing or might cause or result in undue waste of time;
  - (d) in the case of a demonstration—the extent to which the demonstration will properly reproduce the conduct or event to be demonstrated;
  - (e) in the case of an inspection—the extent to which the place or thing to be inspected has materially altered.

- (4) The court (including, if there is a jury, the jury) must not conduct an experiment in the course of its deliberations.
- (5) This section does not apply in relation to the inspection of an exhibit by the court or, if there is a jury, by the jury.

**54 Views to be evidence**

The court (including, if there is a jury, the jury) may draw any reasonable inference from what it sees, hears or otherwise notices during a demonstration, experiment or inspection.

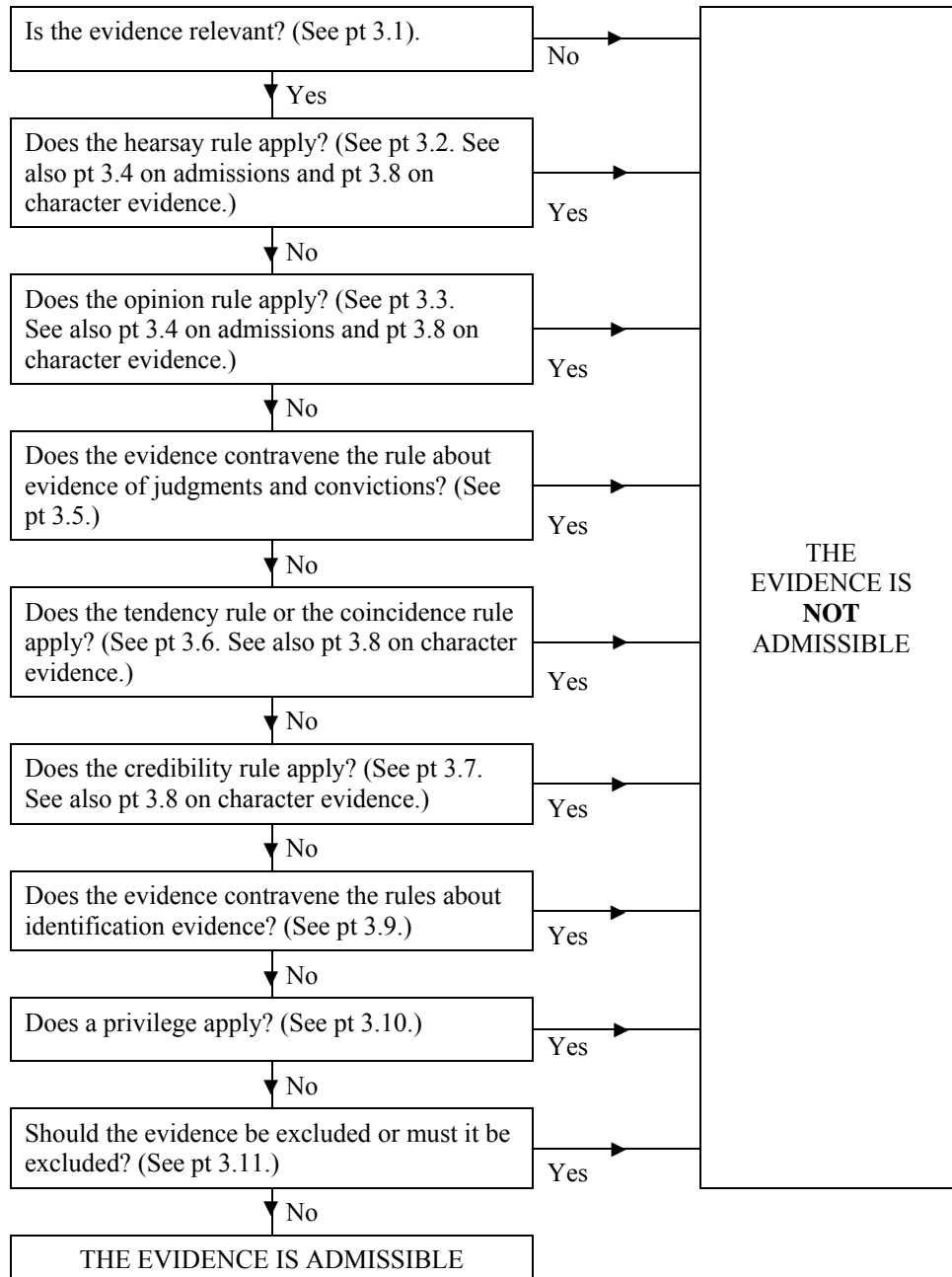
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## Chapter 3 Admissibility of evidence

*Note* This chapter is about whether evidence presented in a proceeding is admissible.

- Pt 3.1 sets out the general inclusionary rule that relevant evidence is admissible.
- Pt 3.2 is about the exclusion of hearsay evidence, and exceptions to the hearsay rule.
- Pt 3.3 is about exclusion of opinion evidence, and exceptions to the opinion rule.
- Pt 3.4 is about admissions and the extent to which they are admissible as exceptions to the hearsay rule and the opinion rule.
- Pt 3.5 is about exclusion of certain evidence of judgments and convictions.
- Pt 3.6 is about exclusion of evidence of tendency or coincidence, and exceptions to the tendency rule and the coincidence rule.
- Pt 3.7 is about exclusion of evidence relevant only to credibility, and exceptions to the credibility rule.
- Pt 3.8 is about character evidence and the extent to which it is admissible as exceptions to the hearsay rule, the opinion rule, the tendency rule and the credibility rule.
- Pt 3.9 is about the requirements that must be satisfied before identification evidence is admissible.
- Pt 3.10 is about the various categories of privilege that may prevent evidence being presented.
- Pt 3.11 provides for the discretionary and mandatory exclusion of evidence even if it would otherwise be admissible.

The following diagram shows how this chapter applies to particular evidence:



## **Part 3.1                      Relevance**

### **55                      Relevant evidence**

- (1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.
- (2) In particular, evidence is not taken to be irrelevant only because it relates only to—
  - (a) the credibility of a witness; or
  - (b) the admissibility of other evidence; or
  - (c) a failure to present evidence.

### **56                      Relevant evidence to be admissible**

- (1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.
- (2) Evidence that is not relevant in the proceeding is not admissible.

### **57                      Provisional relevance**

- (1) If the decision about the question whether evidence presented by a party is relevant depends on the court making another finding (including a finding that the evidence is what the party claims it to be), the court may find that the evidence is relevant—
  - (a) if it is reasonably open to make the finding; or
  - (b) subject to further evidence being admitted at a later stage of the proceeding that will make it reasonably open to make the finding.

- (2) Without limiting subsection (1), if the relevance of evidence of an act done by a person depends on the court making a finding that the person and 1 or more other people had, or were acting in furtherance of, a common purpose (whether to effect an unlawful conspiracy or otherwise), the court may use the evidence itself in deciding whether the common purpose existed.

**58 Inferences as to relevance**

- (1) If a question arises as to the relevance of a document or thing, the court may examine it and may draw any reasonable inference from it, including an inference as to its authenticity or identity.
- (2) Subsection (1) does not limit the matters from which inferences may properly be drawn.

## Part 3.2 Hearsay

### Division 3.2.1 The hearsay rule

#### 59 The hearsay rule—exclusion of hearsay evidence

- (1) Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation.
- (2) For this part, a fact mentioned in subsection (1) is an *asserted fact*.
- (3) For the purposes of deciding under subsection (1) whether it can reasonably be supposed that the person intended to assert a particular fact by the representation, the court may have regard to the circumstances in which the representation was made.

*Note* Subsection (3) was inserted as a response to the decision of the NSW Supreme Court in *R v Hannes* (2000) 158 FLR 359.

- (4) Subsection (1) does not apply to evidence of a representation contained in a certificate or other document given or made under a regulation made under an Act other than this Act to the extent to which the regulation provides that the certificate or other document has evidentiary effect.

*Note* Specific exceptions to the hearsay rule are as follows:

- evidence relevant for a non-hearsay purpose (s 60)
- first-hand hearsay:
  - civil proceedings, if the maker of the representation is unavailable (s 63) or available (s 64)
  - criminal proceedings, if the maker of the representation is unavailable (s 65) or available (s 66)
- contemporaneous statements about a person's health etc (s 66A)
- business records (s 69)
- tags and labels (s 70)
- electronic communications (s 71)

- Aboriginal and Torres Strait Islander traditional laws and customs (s 72)
- marriage, family history or family relationships (s 73)
- public or general rights (s 74)
- use of evidence in interlocutory proceedings (s 75)
- admissions (s 81)
- representations about employment or authority (s 87 (2))
- exceptions to the rule excluding evidence of judgments and convictions (s 92 (3))
- character of and expert opinion about accused people (s 110 and s 111).

Other provisions of this Act, or of other laws, may operate as further exceptions.

#### **Examples**

- 1 D is the defendant in a sexual assault trial. W has made a statement to the police that X told W that X had seen D leave a night club with the victim shortly before the sexual assault is alleged to have happened. Unless an exception to the hearsay rule applies, evidence of what X told W cannot be given at the trial.
- 2 P had told W that the handbrake on W's car did not work. Unless an exception to the hearsay rule applies, evidence of that statement cannot be given by P, W or anyone else to prove that the handbrake was defective.
- 3 W had bought a video cassette recorder and written down its serial number on a document. Unless an exception to the hearsay rule applies, the document is inadmissible to prove that a video cassette recorder later found in D's possession was the video cassette recorder bought by W.

*Note* An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see [Legislation Act](#), s 126 and s 132).



**60 Exception—evidence relevant for a non-hearsay purpose**

- (1) The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of an asserted fact.
- (2) This section applies whether or not the person who made the representation had personal knowledge of the asserted fact (within the meaning of section 62 (2) (Restriction to first-hand hearsay)).

*Note* Subsection (2) was inserted as a response to the decision of the High Court in *Lee v The Queen* (1998) 195 CLR 594.

- (3) However, this section does not apply in a criminal proceeding to evidence of an admission.

*Note* The admission might still be admissible under s 81 as an exception to the hearsay rule if it is first-hand hearsay—see s 82.

**61 Exceptions to the hearsay rule dependent on competency**

- (1) This part does not enable use of a previous representation to prove the existence of an asserted fact if, when the representation was made, the person who made it was not competent to give evidence about the fact because of section 13 (1) (Competence—lack of capacity).
- (2) This section does not apply to a contemporaneous representation made by a person about the person's health, feelings, sensations, intention, knowledge or state of mind.

*Note* For the admissibility of contemporaneous representations, see s 66A.

- (3) For this section, it is presumed, unless the contrary is proved, that when the representation was made the person who made it was competent to give evidence about the asserted fact.

## Division 3.2.2 First-hand hearsay

### 62 Restriction to first-hand hearsay

- (1) For this division (other than in subsection (2)), a *previous representation* is a previous representation that was made by a person who had personal knowledge of an asserted fact.
- (2) A person has personal knowledge of an asserted fact if the person's knowledge of the fact was, or might reasonably be supposed to have been, based on something that the person saw, heard or otherwise perceived, other than a previous representation made by someone else about the fact.
- (3) For section 66A (Exception—contemporaneous statements about a person's health etc), a person has personal knowledge of the asserted fact if it is a fact about the person's health, feelings, sensations, intention, knowledge or state of mind at the time the representation mentioned in the section was made.

### 63 Exception—civil proceedings if maker not available

- (1) This section applies in a civil proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.
- (2) The hearsay rule does not apply to—
  - (a) evidence of the representation that is given by a person who saw, heard or otherwise perceived the representation being made; or
  - (b) a document so far as it contains the representation, or another representation to which it is reasonably necessary to refer in order to understand the representation.

*Note 1* Section 67 imposes notice requirements relating to this subsection.

*Note 2* The dictionary, pt 2, s 4 is about the availability of people.

**64 Exception—civil proceedings if maker available**

- (1) This section applies in a civil proceeding if a person who made a previous representation is available to give evidence about an asserted fact.
- (2) The hearsay rule does not apply to—
  - (a) evidence of the representation that is given by a person who saw, heard or otherwise perceived the representation being made; or
  - (b) a document so far as it contains the representation, or another representation to which it is reasonably necessary to refer in order to understand the representation;

if it would cause undue expense or undue delay, or would not be reasonably practicable, to call the person who made the representation to give evidence.

*Note 1* Section 67 imposes notice requirements relating to this subsection.

*Note 2* Section 68 is about objections to notices that relate to this subsection.

- (3) If the person who made the representation has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by—
  - (a) the person; or
  - (b) a person who saw, heard or otherwise perceived the representation being made.
- (4) A document containing a representation to which subsection (3) applies must not be tendered before the conclusion of the examination-in-chief of the person who made the representation, unless the court gives leave.

*Note* The dictionary, pt 2, s 4 is about the availability of people.

**65 Exception—criminal proceedings if maker not available**

- (1) This section applies in a criminal proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.
- (2) The hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation—
  - (a) was made under a duty to make that representation or to make representations of that kind; or
  - (b) was made when or shortly after the asserted fact happened and in circumstances that make it unlikely that the representation is a fabrication; or
  - (c) was made in circumstances that make it highly probable that the representation is reliable; or
  - (d) was—
    - (i) against the interests of the person who made it at the time it was made; and
    - (ii) made in circumstances that make it likely that the representation is reliable.

*Note* Section 67 imposes notice requirements relating to this subsection.

- (3) The hearsay rule does not apply to evidence of a previous representation made in the course of giving evidence in an Australian or overseas proceeding if, in the proceeding, the defendant in the proceeding to which this section is being applied—
  - (a) cross-examined the person who made the representation about it; or
  - (b) had a reasonable opportunity to cross-examine the person who made the representation about it.

*Note* Section 67 imposes notice requirements relating to this subsection.

- (4) If there is more than 1 defendant in the criminal proceeding, evidence of a previous representation that—
- (a) is given in an Australian or overseas proceeding; and
  - (b) is admitted into evidence in the criminal proceeding because of subsection (3);
- cannot be used against a defendant who did not cross-examine, and did not have a reasonable opportunity to cross-examine, the person about the representation.
- (5) For subsection (3) and subsection (4), a defendant is taken to have had a reasonable opportunity to cross-examine a person if the defendant was not present at a time when the cross-examination of a person might have been conducted but—
- (a) could reasonably have been present at the time; and
  - (b) if present could have cross-examined the person.
- (6) Evidence of the making of a representation to which subsection (3) applies may be presented by producing a transcript, or a recording, of the representation that is authenticated by—
- (a) the person to whom, or the court or other body to which, the representation was made; or
  - (b) if applicable, the registrar or other proper officer of the court or other body to which the representation was made; or
  - (c) the entity responsible for producing the transcript or recording.
- (7) Without limiting subsection (2) (d), a representation is taken for subsection (2) (d) to be against the interests of the person who made it if it tends—
- (a) to damage the person's reputation; or
  - (b) to show that the person has committed an offence for which the person has not been convicted; or

(c) to show that the person is liable in an action for damages.

(8) The hearsay rule does not apply to—

(a) evidence of a previous representation presented by a defendant if the evidence is given by a person who saw, heard or otherwise perceived the representation being made; or

(b) a document tendered as evidence by a defendant so far as it contains a previous representation, or another representation to which it is reasonably necessary to refer in order to understand the representation.

*Note* Section 67 imposes notice requirements relating to this subsection.

(9) If evidence of a previous representation about a matter has been presented by a defendant and has been admitted, the hearsay rule does not apply to evidence of another representation about the matter that—

(a) is presented by another party; and

(b) is given by a person who saw, heard or otherwise perceived the other representation being made.

*Note* The dictionary, pt 2, s 4 is about the availability of people.

## **66 Exception—criminal proceedings if maker available**

(1) This section applies in a criminal proceeding if a person who made a previous representation is available to give evidence about an asserted fact.

(2) If the person has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by—

(a) the person; or

(b) a person who saw, heard or otherwise perceived the representation being made;

if, when the representation was made, the happening of the asserted fact was fresh in the memory of the person who made the representation.

- (3) In deciding whether the happening of the asserted fact was fresh in the memory of a person, the court may take into account all matters that it considers are relevant to the question, including—
- (a) the nature of the event concerned; and
  - (b) the age and health of the person; and
  - (c) the time between the happening of the asserted fact and the making of the representation.

*Note* Subsection (3) was inserted as a response to the decision of the High Court in *Graham v The Queen* (1998) 195 CLR 606.

- (4) If a representation was made for the purpose of indicating the evidence that the person who made it would be able to give in an Australian or overseas proceeding, subsection (2) does not apply to evidence presented by the prosecutor of the representation unless the representation is about the identity of a person, place or thing.
- (5) A document containing a representation to which subsection (2) applies must not be tendered before the conclusion of the examination-in-chief of the person who made the representation, unless the court gives leave.

*Note* The dictionary, pt 2, s 4 is about the availability of people.

## **66A Exception—contemporaneous statements about a person's health etc**

The hearsay rule does not apply to evidence of a previous representation made by a person if the representation was a contemporaneous representation about the person's health, feelings, sensations, intention, knowledge or state of mind.

**67 Notice to be given**

- (1) A relevant exception does not apply to evidence presented by a party unless the party has given reasonable notice in writing to each other party of the party's intention to present the evidence.
- (2) A notice given under subsection (1) must be given in accordance with any regulation or rules of court made for this section.
- (3) The notice must state—
  - (a) each relevant exception on which the party intends to rely in arguing that the hearsay rule does not apply to the evidence; and
  - (b) if section 64 (2) (Exception—civil proceedings if maker available) is to be relied on—the grounds, stated in the section, on which the party intends to rely.
- (4) Despite subsection (1), if notice has not been given, the court may, on the application of a party, direct that 1 or more relevant exceptions apply despite the party's failure to give notice.
- (5) The direction—
  - (a) is subject to the conditions (if any) the court thinks fit; and
  - (b) in particular, may provide that, in relation to stated evidence, 1 or more relevant exceptions apply with the modifications the court states.
- (6) In this section:  
*relevant exception* means—
  - (a) section 63 (2) (Exception—civil proceedings if maker not available); or
  - (b) section 64 (2) (Exception—civil proceedings if maker available); or



- (c) section 65 (2), (3) and (8) (Exception—criminal proceedings if maker not available).

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

- (1) In a civil proceeding, if the notice discloses that it is not intended to call the person who made the previous representation because it—
- (a) would cause undue expense or undue delay; or
  - (b) would not be reasonably practicable;
- a party may, not later than 21 days after the day notice has been given, object to the tender of the evidence, or of a stated part of the evidence.
- (2) The objection must be made by giving to each other party a written notice setting out the grounds on which the objection is made.
- (3) The court may, on the application of a party, decide the objection at or before the hearing.
- (4) If the objection is unreasonable, the court may order that, in any event, the party objecting must bear the costs incurred by another party—
- (a) in relation to the objection; and
  - (b) in calling the person who made the representation to give evidence.

*Note* Subsection (4) differs from the [Commonwealth Act](#), s 68 (4) because of the different way costs are worked out by ACT courts.

## **Division 3.2.3 Other exceptions to the hearsay rule**

### **69 Exception—business records**

- (1) This section applies to a document that—
  - (a) either—
    - (i) is or forms part of a record belonging to or kept by an entity in the course of, or for the purposes of, a business; or
    - (ii) at any time was or formed part of the record; and
  - (b) contains a previous representation made or recorded in the document in the course of, or for the purposes of, the business.
- (2) The hearsay rule does not apply to the document (so far as it contains the representation) if the representation was made—
  - (a) by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact; or
  - (b) on the basis of information directly or indirectly supplied by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact.
- (3) Subsection (2) does not apply if the representation—
  - (a) was prepared or obtained for the purpose of conducting, or for or in contemplation of or in connection with, an Australian or overseas proceeding; or
  - (b) was made in connection with an investigation relating or leading to a criminal proceeding.
- (4) If—
  - (a) the happening of an event of a particular kind is in question; and

- (b) in the course of a business, a system has been followed of making and keeping a record of the happening of all events of that kind;

the hearsay rule does not apply to evidence that tends to prove that there is no record kept, in accordance with the system, of the happening of the event.

- (5) For this section, a person is taken to have had personal knowledge of a fact if the person's knowledge of the fact was or might reasonably be supposed to have been based on what the person saw, heard or otherwise perceived (other than a previous representation made by a person about the fact).

*Note 1* Sections 48, 49, 50, 146, 147 and 150 (1) are relevant to the mode of proof, and authentication, of business records.

*Note 2* The [Commonwealth Act](#), s 182 gives the [Commonwealth Act](#), s 69 a wider application in relation to Commonwealth records.

## **70 Exception—contents of tags, labels and writing**

The hearsay rule does not apply to a tag or label attached to, or writing placed on, an object (including a document) if the tag or label or writing may reasonably be supposed to have been attached or placed—

- (a) in the course of a business; and
- (b) for the purpose of describing or stating the identity, nature, ownership, destination, origin or weight of the object, or of the contents (if any) of the object.

*Note* The [Commonwealth Act](#), s 70 includes an additional subsection providing that the exception does not apply to customs and excise prosecutions. The [Commonwealth Act](#), s 5 extends the application of the subsection to proceedings in all Australian courts.

**71 Exception—electronic communications**

The hearsay rule does not apply to a representation contained in a document recording an electronic communication so far as the representation is a representation as to—

- (a) the identity of the person from whom or on whose behalf the communication was sent; or
- (b) the date or time when the communication was sent; or
- (c) the communication’s destination or the identity of the person to whom the communication was addressed.

*Note 1* Div 4.3.3 contains presumptions about electronic communications.

*Note 2* The [Commonwealth Act](#), s 182 gives the [Commonwealth Act](#), s 71 a wider application in relation to Commonwealth records.

*Note 3* *Electronic communication*—see the dictionary.

**72 Exception—Aboriginal and Torres Strait Islander traditional laws and customs**

The hearsay rule does not apply to evidence of a representation about the existence or non-existence, or the content, of the traditional laws and customs of an Aboriginal or Torres Strait Islander group.

**73 Exception—reputation as to relationships and age**

- (1) The hearsay rule does not apply to evidence of reputation about—
  - (a) whether a person was, at a particular time or at any time, a married person; or
  - (b) whether a man and a woman cohabiting at a particular time were married to each other at the time; or
  - (c) a person’s age; or
  - (d) family history or a family relationship.

- (2) In a criminal proceeding, subsection (1) does not apply to evidence presented by a defendant unless—
  - (a) it tends to contradict evidence mentioned in subsection (1) that has been admitted; or
  - (b) the defendant has given reasonable notice in writing to each other party of the defendant's intention to present the evidence.
- (3) In a criminal proceeding, subsection (1) does not apply to evidence presented by the prosecutor unless it tends to contradict evidence mentioned in subsection (1) that has been admitted.

**74 Exception—reputation of public or general rights**

- (1) The hearsay rule does not apply to evidence of reputation about the existence, nature or extent of a public or general right.
- (2) In a criminal proceeding, subsection (1) does not apply to evidence presented by the prosecutor unless it tends to contradict evidence mentioned in subsection (1) that has been admitted.

**75 Exception—interlocutory proceedings**

In an interlocutory proceeding, the hearsay rule does not apply to evidence if the party who presents it also presents evidence of its source.

## Part 3.3                      Opinion

### 76                      The opinion rule

- (1) Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.
- (2) Subsection (1) does not apply to evidence of an opinion contained in a certificate or other document given or made under a regulation made under an Act other than this Act to the extent to which the regulation provides that the certificate or other document has evidentiary effect.

*Note*                      Specific exceptions to the opinion rule are as follows:

- summaries of voluminous or complex documents (s 50 (3))
- evidence relevant otherwise than as opinion evidence (s 77)
- lay opinion (s 78)
- Aboriginal and Torres Strait Islander traditional laws and customs (s 78A)
- expert opinion (s 79)
- admissions (s 81)
- exceptions to the rule excluding evidence of judgments and convictions (s 92 (3))
- character of and expert opinion about accused people (s 110 and s 111).

Other provisions of this Act, or of other laws, may operate as further exceptions.

#### **Examples**

- 1     P sues D, her doctor, for the negligent performance of a surgical operation. Unless an exception to the opinion rule applies, P's neighbour, W, who had the same operation, cannot give evidence of his opinion that D had not performed the operation as well as his own.

- 2 P considers that electrical work that D, an electrician, has done for her is unsatisfactory. Unless an exception to the opinion rule applies, P cannot give evidence of her opinion that D does not have the necessary skills to do electrical work.

*Note* An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see [Legislation Act](#), s 126 and s 132).

**77 Exception—evidence relevant otherwise than as opinion evidence**

The opinion rule does not apply to evidence of an opinion that is admitted because it is relevant for a purpose other than proof of the existence of a fact about the existence of which the opinion was expressed.

**78 Exception—lay opinions**

The opinion rule does not apply to evidence of an opinion expressed by a person if—

- (a) the opinion is based on what the person saw, heard or otherwise perceived about a matter or event; and
- (b) evidence of the opinion is necessary to obtain an adequate account or understanding of the person's perception of the matter or event.

**78A Exception—Aboriginal and Torres Strait Islander traditional laws and customs**

The opinion rule does not apply to evidence of an opinion expressed by a member of an Aboriginal or Torres Strait Islander group about the existence or non-existence, or the content, of the traditional laws and customs of the group.

**79 Exception—opinions based on specialised knowledge**

- (1) If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of the person's opinion that is completely or substantially based on that knowledge.
- (2) To remove any doubt, and without limiting subsection (1)—
  - (a) a reference in that subsection to specialised knowledge includes a reference to specialised knowledge of child development and child behaviour (including specialised knowledge of the impact of sexual abuse on children and their development and behaviour during and following the abuse); and
  - (b) a reference in that subsection to an opinion of a person includes, if the person has specialised knowledge mentioned in paragraph (a), a reference to an opinion relating to either or both of the following:
    - (i) the development and behaviour of children generally;
    - (ii) the development and behaviour of children who have been victims of sexual offences, or offences similar to sexual offences.

**80 Ultimate issue and common knowledge rules abolished**

Evidence of an opinion is not inadmissible only because it is about—

- (a) a fact in issue or an ultimate issue; or
- (b) a matter of common knowledge.



## Part 3.4 Admissions

*Note* **Admission**—see the dictionary.

### 81 Hearsay and opinion rules—exception for admissions and related representations

- (1) The hearsay rule and opinion rule do not apply to evidence of an admission.
- (2) The hearsay rule and opinion rule do not apply to evidence of a previous representation—
  - (a) that was made in relation to an admission at the time the admission was made, or shortly before or after that time; and
  - (b) to which it is reasonably necessary to refer in order to understand the admission.

*Note* Specific exclusionary rules relating to admissions are as follows:

- evidence of admissions that is not first-hand (s 82)
- use of admissions against third parties (s 83)
- admissions influenced by violence etc (s 84)
- unreliable admissions of accused people (s 85)
- records of oral questioning of accused people (s 86).

#### Example

D admits to W, his best friend, that he sexually assaulted V. In D's trial for the sexual assault, the prosecution may lead evidence from W—

- (a) that D made the admission to W as proof of the truth of the admission; and
- (b) that W formed the opinion that D was sane when he made the admission.

*Note* An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see [Legislation Act](#), s 126 and s 132).

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

Section 81 does not prevent the application of the hearsay rule to evidence of an admission unless—

- (a) it is given by a person who saw, heard or otherwise perceived the admission being made; or
- (b) it is a document in which the admission is made.

*Note* Section 60 (Exception—evidence relevant for a non-hearsay purpose) does not apply in a criminal proceeding to evidence of an admission.

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

- (1) Section 81 does not prevent the application of the hearsay rule or opinion rule to evidence of an admission in relation to the case of a third party.
- (2) The evidence may be used in relation to the case of a third party if the third party consents.
- (3) Consent cannot be given in relation to part only of the evidence.
- (4) In this section:

*third party* means a party to the proceeding, other than the party who—

- (a) made the admission; or
- (b) presented the evidence.

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

- (1) Evidence of an admission is not admissible unless the court is satisfied that the admission, and the making of the admission, were not influenced by—
  - (a) violent, oppressive, inhuman or degrading conduct, whether towards the person who made the admission or towards someone else; or
  - (b) a threat of conduct mentioned in paragraph (a).
- (2) Subsection (1) only applies if the party against whom evidence of the admission is presented has raised in the proceeding an issue about whether the admission or its making were influenced in a way mentioned in subsection (1).

**85 Criminal proceedings—reliability of admissions by defendants**

- (1) This section applies only in a criminal proceeding and only to evidence of an admission made by a defendant—
  - (a) to, or in the presence of, an investigating official who at the time was exercising functions in connection with the investigation of the commission, or possible commission, of an offence; or
  - (b) as a result of an act of someone else who was, and who the defendant knew or reasonably believed to be, capable of influencing the decision whether a prosecution of the defendant should be brought or should be continued.

*Note* Subsection (1) was inserted as a response to the decision of the High Court of in *Kelly v The Queen* (2004) 218 CLR 216.
- (2) Evidence of the admission is not admissible unless the circumstances in which the admission was made make it unlikely that the truth of the admission was adversely affected.

- (3) Without limiting the matters that the court may take into account for subsection (2), it must take into account—
- (a) any relevant condition or characteristic of the person who made the admission, including age, personality and education and any mental, intellectual or physical disability to which the person is or appears to be subject; and
  - (b) if the admission was made in response to questioning—
    - (i) the nature of the questions and the way in which they were put; and
    - (ii) the nature of any threat, promise or other inducement made to the person questioned.

## 86 Exclusion of records of oral questioning

- (1) This section applies only in a criminal proceeding and only if an oral admission was made by a defendant to an investigating official in response to a question put or representation made by the official.
- (2) A document prepared by or on behalf of the official is not admissible to prove the contents of the question, representation or response unless the defendant has acknowledged that the document is a true record of the question, representation or response.
- (3) The acknowledgment must be made by signing, initialling or otherwise marking the document.
- (4) In this section:  
*document* does not include the following:
  - (a) a sound recording, or a transcript of a sound recording;
  - (b) a recording of visual images and sounds, or a transcript of the recorded sounds.

**87 Admissions made with authority**

- (1) For the purpose of deciding whether a previous representation made by a person is also taken to be an admission by a party, the court must admit the representation if it is reasonably open to find that—
  - (a) when the representation was made, the person had authority to make statements on behalf of the party in relation to the matter in relation to which the representation was made; or
  - (b) when the representation was made, the person was an employee of the party, or had authority otherwise to act for the party, and the representation related to a matter within the scope of the person's employment or authority; or
  - (c) the representation was made by the person in furtherance of a common purpose (whether lawful or not) that the person had with the party or 1 or more people including the party.
- (2) For this section, the hearsay rule does not apply to a previous representation made by a person that tends to prove—
  - (a) that the person had authority to make statements on behalf of someone else in relation to a matter; or
  - (b) that the person was an employee of someone else or had authority otherwise to act for someone else; or
  - (c) the scope of the person's employment or authority.

**88 Proof of admissions**

For the purpose of deciding whether evidence of an admission is admissible, the court must find that a particular person made the admission if it is reasonably open to find that the person made the admission.

## 89 Evidence of silence

- (1) In a criminal proceeding, an inference unfavourable to a party must not be drawn from evidence that the party or someone else failed—
- (a) to answer 1 or more questions; or
  - (b) to respond to a representation;

put or made to the party or other person by an investigating official who at the time was exercising functions in connection with the investigation of the commission, or possible commission, of an offence.

*Note* **Fail** includes refuse (see [Legislation Act](#), dict, pt 1).

- (2) Evidence of that kind is not admissible if it can only be used to draw an inference mentioned in subsection (1).
- (3) Subsection (1) does not prevent use of the evidence to prove that the party or other person failed to answer the question or to respond to the representation if the failure is a fact in issue in the proceeding.
- (4) In this section:
- inference** includes the following:
- (a) an inference of consciousness of guilt;
  - (b) an inference relevant to a party's credibility.

## 90 Discretion to exclude admissions

In a criminal proceeding, the court may refuse to admit evidence of an admission, or refuse to admit the evidence to prove a particular fact, if—

- (a) the evidence is presented by the prosecution; and
- (b) having regard to the circumstances in which the admission was made, it would be unfair to a defendant to use the evidence.

*Note* Pt 3.11 contains other exclusionary discretions that apply to admissions.

## Part 3.5 Evidence of judgments and convictions

### 91 Exclusion of evidence of judgments and convictions

- (1) Evidence of the decision, or of a finding of fact, in an Australian or overseas proceeding is not admissible to prove the existence of a fact that was in issue in the proceeding.
- (2) Evidence that, under this part, is not admissible to prove the existence of a fact may not be used to prove the fact even if it is relevant for another purpose.

*Note* Section 178 (Convictions, acquittals and other judicial proceedings) provides for certificate evidence of decisions.

### 92 Exceptions

- (1) Section 91 (1) does not prevent the admission or use of evidence of the grant of probate, letters of administration or a similar order of a court to prove—
  - (a) the death, or date of death, of a person; or
  - (b) the proper execution of a testamentary document.
- (2) In a civil proceeding, section 91 (1) does not prevent the admission or use of evidence that a party, or a person through or under whom a party claims, has been convicted of an offence, other than a conviction—
  - (a) in relation to which a review or appeal (however described) has been started but not finally decided; or
  - (b) that has been quashed or set aside; or
  - (c) in relation to which a pardon has been given.
- (3) The hearsay rule and the opinion rule do not apply to evidence mentioned in this section.

**93 Savings**

This part does not affect the operation of—

- (a) a law that relates to the admissibility or effect of evidence of a conviction tendered in a proceeding (including a criminal proceeding) for defamation; or
- (b) a judgment *in rem*; or
- (c) the law relating to *res judicata* or issue estoppel.



## Part 3.6 Tendency and coincidence

### 94 Application—pt 3.6

- (1) This part does not apply to evidence that relates only to the witness's credibility.
- (2) This part does not apply so far as a proceeding relates to bail or sentencing.
- (3) This part does not apply to evidence of—
  - (a) the character, reputation or conduct of a person; or
  - (b) a tendency that a person has or had;if that character, reputation, conduct or tendency is a fact in issue.

### 95 Use of evidence for other purposes

- (1) Evidence that under this part is not admissible to prove a particular matter must not be used to prove the matter even if it is relevant for another purpose.
- (2) Evidence that under this part cannot be used against a party to prove a particular matter must not be used against the party to prove the matter even if it is relevant for another purpose.

### 96 Failure to act

A reference in this part to doing an act includes a reference to failing to do that act.

*Note* *Fail* includes refuse (see [Legislation Act](#), dict, pt 1).

**97 The tendency rule**

- (1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind unless—
  - (a) the party seeking to present the evidence gave reasonable notice in writing to each other party of the party's intention to present the evidence; and
  - (b) the court thinks that the evidence will, either by itself or having regard to other evidence presented or to be presented by the party seeking to present the evidence, have significant probative value.
- (2) Subsection (1) (a) does not apply if—
  - (a) the evidence is presented in accordance with a direction made by the court under section 100 (Court may dispense with notice requirements); or
  - (b) the evidence is presented to explain or contradict tendency evidence presented by another party.

*Note* The tendency rule is subject to specific exceptions about the character of and expert opinion about accused people (s 110 and s 111). Other provisions of this Act, or of other laws, may operate as further exceptions.

**98 The coincidence rule**

- (1) Evidence that 2 or more events happened is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they happened, or any similarities in both the events and the circumstances in which they happened, it is improbable that the events happened coincidentally unless—
- (a) the party seeking to present the evidence gave reasonable notice in writing to each other party of the party's intention to present the evidence; and
  - (b) the court thinks that the evidence will, either by itself or having regard to other evidence presented or to be presented by the party seeking to present the evidence, have significant probative value.

*Note* One of the events referred to in s (1) may be an event the happening of which is a fact in issue in the proceeding.

- (2) Subsection (1) (a) does not apply if—
- (a) the evidence is presented in accordance with a direction made by the court under section 100 (Court may dispense with notice requirements); or
  - (b) the evidence is presented to explain or contradict coincidence evidence presented by another party.

*Note* Other provisions of this Act, or of other laws, may operate as exceptions to the coincidence rule.

**99 Requirements for notices**

A notice given under section 97 (The tendency rule) or section 98 (The coincidence rule) must be given in accordance with any regulation or rules of court made for this section.

**100 Court may dispense with notice requirements**

- (1) The court may, on the application of a party, direct that the tendency rule is not to apply to particular tendency evidence despite the party's failure to give notice under section 97 (The tendency rule).
- (2) The court may, on the application of a party, direct that the coincidence rule is not to apply to particular coincidence evidence despite the party's failure to give notice under section 98 (The coincidence rule).
- (3) The application may be made either before or after the time by which the party would, apart from this section, be required to give, or to have given, the notice.
- (4) In a civil proceeding, the party's application may be made without notice of it having been given to 1 or more of the other parties.
- (5) The direction—
  - (a) is subject to the conditions (if any) the court thinks fit; and
  - (b) may be given at or before the hearing.
- (6) Without limiting the court's power to impose conditions under this section, the conditions may include 1 or more of the following:
  - (a) a condition that the party give notice of its intention to present the evidence to a stated party, or to each party other than a stated party;
  - (b) a condition that the party give the notice only in relation to stated tendency evidence, or all tendency evidence that the party intends to present other than stated tendency evidence;
  - (c) a condition that the party give the notice only in relation to stated coincidence evidence, or all coincidence evidence that the party intends to present other than stated coincidence evidence.

**101 Further restrictions on tendency evidence and coincidence evidence presented by prosecution**

- (1) This section applies only in a criminal proceeding and applies in addition to section 97 (The tendency rule) and section 98 (The coincidence rule).
- (2) Tendency evidence about a defendant, or coincidence evidence about a defendant, that is presented by the prosecution cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant.
- (3) This section does not apply to tendency evidence that the prosecution presents to explain or contradict tendency evidence presented by the defendant.
- (4) This section does not apply to coincidence evidence that the prosecution presents to explain or contradict coincidence evidence presented by the defendant.

## **Part 3.7** Credibility

### **Division 3.7.1** Credibility evidence

#### **101A** Credibility evidence

Credibility evidence, in relation to a witness or someone else, is evidence relevant to the credibility of the witness or person that—

- (a) is relevant only because it affects the assessment of the credibility of the witness or person; or
- (b) is relevant—
  - (i) because it affects the assessment of the credibility of the witness or person; and
  - (ii) for some other purpose for which it is not admissible, or cannot be used, because of a provision of parts 3.2 to 3.6.

*Note 1* Section 60 and s 77 will not affect the application of par (b), because they cannot apply to evidence that is yet to be admitted.

*Note 2* Section 101A was inserted as a response to the decision of the High Court in *Adam v The Queen* (2001) 207 CLR 96.

## **Division 3.7.2      Credibility of witnesses**

### **102      The credibility rule**

Credibility evidence about a witness is not admissible.

*Note 1*    Specific exceptions to the credibility rule are as follows:

- evidence given in cross-examination (s 103 and s 104)
- evidence in rebuttal of denials (s 106)
- evidence to re-establish credibility (s 108)
- evidence of people with specialised knowledge (s 108C)
- character of accused people (s 110).

Other provisions of this Act, or of other laws, may operate as further exceptions.

*Note 2*    Section 108A and s 108B deal with the admission of credibility evidence about a person who has made a previous representation but is not a witness.

### **103      Exception—cross-examination as to credibility**

- (1) The credibility rule does not apply to evidence given by a witness in cross-examination if the evidence could substantially affect the assessment of the witness's credibility.
- (2) Without limiting the matters to which the court may have regard for subsection (1), it must have regard to—
  - (a) whether the evidence tends to prove that the witness knowingly or recklessly made a false representation when the witness was under an obligation to tell the truth; and
  - (b) the period that has elapsed since the acts or events to which the evidence relates were done or happened.

**104 Further protections—cross-examination as to credibility**

- (1) This section applies only to credibility evidence in a criminal proceeding and applies in addition to section 103.
- (2) A defendant must not be cross-examined about a matter that is relevant to the assessment of the defendant's credibility, unless the court gives leave.
- (3) Despite subsection (2), leave is not required for cross-examination by the prosecutor about whether the defendant—
  - (a) is biased or has a motive to be untruthful; or
  - (b) is, or was, unable to be aware of or recall matters to which the defendant's evidence relates; or
  - (c) has made a prior inconsistent statement.
- (4) The prosecutor must not be given leave under subsection (2) unless evidence presented by the defendant has been admitted that—
  - (a) tends to prove that a witness called by the prosecutor has a tendency to be untruthful; and
  - (b) is relevant solely or mainly to the witness's credibility.
- (5) A reference in subsection (4) to evidence does not include a reference to evidence of conduct in relation to—
  - (a) the events in relation to which the defendant is being prosecuted; or
  - (b) the investigation of the offence for which the defendant is being prosecuted.
- (6) Leave must not be given for cross-examination by another defendant unless—
  - (a) the evidence that the defendant to be cross-examined has given includes evidence adverse to the defendant seeking leave to cross-examine; and



(b) that evidence has been admitted.

**106 Exception—rebutting denials by other evidence**

- (1) The credibility rule does not apply to evidence that is relevant to a witness's credibility and that is presented otherwise than from the witness if—
- (a) in cross-examination of the witness—
    - (i) the substance of the evidence was put to the witness; and
    - (ii) the witness denied, or did not admit or agree to, the substance of the evidence; and
  - (b) the court gives leave to present the evidence.
- (2) Leave under subsection (1) (b) is not required if the evidence tends to prove that the witness—
- (a) is biased or has a motive for being untruthful; or
  - (b) has been convicted of an offence, including an offence against the law of a foreign country; or
  - (c) has made a prior inconsistent statement; or
  - (d) is, or was, unable to be aware of matters to which the witness's evidence relates; or
  - (e) has knowingly or recklessly made a false representation while under an obligation, imposed by or under an Australian law or a law of a foreign country, to tell the truth.

**108 Exception—re-establishing credibility**

- (1) The credibility rule does not apply to evidence given by a witness in re-examination.
- (2) The credibility rule does not apply to evidence of a prior consistent statement of a witness if—
  - (a) evidence of a prior inconsistent statement of the witness has been admitted; or
  - (b) it is or will be suggested (either expressly or by implication) that evidence given by the witness has been fabricated or reconstructed (whether deliberately or otherwise) or is the result of a suggestion;

and the court gives leave to present the evidence of the prior consistent statement.

**Division 3.7.3 Credibility of people who are not witnesses**

**108A Admissibility of evidence of credibility of person who has made a previous representation**

- (1) If—
  - (a) evidence of a previous representation has been admitted in a proceeding; and
  - (b) the person who made the representation has not been called, and will not be called, to give evidence in the proceeding;

credibility evidence about the person who made the representation is not admissible unless the evidence could substantially affect the assessment of the person's credibility.

- (2) Without limiting the matters to which the court may have regard for subsection (1), it must have regard to—
  - (a) whether the evidence tends to prove that the person who made the representation knowingly or recklessly made a false representation when the person was under an obligation to tell the truth; and
  - (b) the period that elapsed between the doing of the acts or the happening of the events to which the representation related and the making of the representation.

**108B Further protections—previous representations of an accused who is not a witness**

- (1) This section applies only in a criminal proceeding and applies in addition to section 108A.
- (2) If the person mentioned in section 108A is a defendant, the credibility evidence is not admissible unless the court gives leave.
- (3) Despite subsection (2), leave is not required if the evidence is about whether the defendant—
  - (a) is biased or has a motive to be untruthful; or
  - (b) is, or was, unable to be aware of or recall matters to which the defendant's previous representation relates; or
  - (c) has made a prior inconsistent statement.
- (4) The prosecution must not be given leave under subsection (2) unless evidence presented by the defendant has been admitted that—
  - (a) tends to prove that a witness called by the prosecution has a tendency to be untruthful; and
  - (b) is relevant solely or mainly to the witness's credibility.

- (5) A reference in subsection (4) to evidence does not include a reference to evidence of conduct in relation to—
  - (a) the events in relation to which the defendant is being prosecuted; or
  - (b) the investigation of the offence for which the defendant is being prosecuted.
- (6) Another defendant must not be given leave under subsection (2) unless the previous representation of the defendant that has been admitted includes evidence adverse to the defendant seeking leave.

### **Division 3.7.4 People with specialised knowledge**

#### **108C Exception—evidence of people with specialised knowledge**

- (1) The credibility rule does not apply to evidence given by a person about the credibility of another witness if—
  - (a) the person has specialised knowledge based on the person’s training, study or experience; and
  - (b) the evidence is evidence of an opinion of the person that—
    - (i) is completely or substantially based on that knowledge; and
    - (ii) could substantially affect the assessment of the credibility of the witness; and
  - (c) the court gives leave to present the evidence.
- (2) To remove any doubt, and without limiting subsection (1)—
  - (a) a reference in that subsection to specialised knowledge includes a reference to specialised knowledge of child development and child behaviour (including specialised knowledge of the impact of sexual abuse on children and their behaviour during and following the abuse); and

- (b) a reference in that subsection to an opinion of a person includes, if the person has specialised knowledge mentioned in paragraph (a), a reference to an opinion relating to either or both of the following:
- (i) the development and behaviour of children generally;
  - (ii) the development and behaviour of children who have been victims of sexual offences, or offences similar to sexual offences.

## Part 3.8 Character

### 109 Application—pt 3.8

This part applies only in a criminal proceeding.

### 110 Evidence about character of accused people

- (1) The hearsay rule, opinion rule, tendency rule and credibility rule do not apply to evidence presented by a defendant to prove (directly or by implication) that the defendant is, either generally or in a particular respect, a person of good character.
- (2) If evidence presented to prove (directly or by implication) that a defendant is generally a person of good character has been admitted, the hearsay rule, opinion rule, tendency rule and credibility rule do not apply to evidence presented to prove (directly or by implication) that the defendant is not generally a person of good character.
- (3) If evidence presented to prove (directly or by implication) that a defendant is a person of good character in a particular respect has been admitted, the hearsay rule, opinion rule, tendency rule and credibility rule do not apply to evidence presented to prove (directly or by implication) that the defendant is not a person of good character in that respect.

### 111 Evidence about character of co-accused

- (1) The hearsay rule and tendency rule do not apply to evidence of a defendant's character if—
  - (a) the evidence is evidence of an opinion about the defendant presented by another defendant; and
  - (b) the person whose opinion it is has specialised knowledge based on the person's training, study or experience; and
  - (c) the opinion is completely or substantially based on that knowledge.

- (2) If evidence mentioned in subsection (1) has been admitted, the hearsay rule, opinion rule and tendency rule do not apply to evidence presented to prove that the evidence should not be accepted.

**112 Leave required to cross-examine about character of accused or co-accused**

A defendant must not be cross-examined about matters arising out of evidence mentioned in this part unless the court gives leave.

## Part 3.9 Identification evidence

*Note* **Identification evidence**—see the dictionary.

### 113 Application—pt 3.9

This part applies only in a criminal proceeding.

### 114 Exclusion of visual identification evidence

(1) In this section:

**picture identification evidence**—see section 115.

**visual identification evidence** means identification evidence relating to an identification based completely or partly on what a person saw but does not include picture identification evidence.

(2) Visual identification evidence presented by the prosecutor is not admissible unless—

- (a) an identification parade that included the defendant was held before the identification was made; or
- (b) it would not have been reasonable to have held the parade; or
- (c) the defendant refused to take part in the parade;

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

(3) Without limiting the matters that may be taken into account by the court in deciding whether it was reasonable to hold an identification parade, it must take into account—

- (a) the kind of offence, and the gravity of the offence; and
- (b) the importance of the evidence; and



- (c) the practicality of holding an identification parade having regard, among other things—
  - (i) if the defendant failed to cooperate in the conduct of the parade—to the manner and extent of, and the reason (if any) for, the failure; and

*Note* **Fail** includes refuse (see [Legislation Act](#), dict, pt 1).

- (ii) in any case—to whether the identification was made at or about the time of the commission of the offence; and
  - (d) the appropriateness of holding an identification parade having regard, among other things, to the relationship (if any) between the defendant and the person who made the identification.
- (4) It is presumed that it would not have been reasonable to have held an identification parade if it would have been unfair to the defendant for the parade to have been held.
- (5) If—
- (a) the defendant refused to take part in an identification parade unless an Australian legal practitioner or legal counsel acting for the defendant, or someone else chosen by the defendant, was present while it was being held; and
  - (b) there were, at the time when the parade was to have been conducted, reasonable grounds to believe that it was not reasonably practicable for a person mentioned in paragraph (a) to be present;

it is presumed that it would not have been reasonable to have held an identification parade at that time.

- (6) In deciding whether it was reasonable to have held an identification parade, the court must not take into account the availability of pictures or photographs that could be used in making identifications.

## 115 Exclusion of evidence of identification by pictures

(1) In this section:

*picture identification evidence* means identification evidence relating to an identification made completely or partly by the person who made the identification examining pictures kept for the use of police officers.

(2) Picture identification evidence presented by the prosecutor is not admissible if the pictures examined suggest that they are pictures of people in police custody.

(3) Subject to subsection (4), picture identification evidence presented by the prosecutor is not admissible if—

(a) when the pictures were examined, the defendant was in the custody of a police officer of the police force investigating the commission of the offence with which the defendant has been charged; and

(b) the picture of the defendant that was examined was made before the defendant was taken into police custody.

(4) Subsection (3) does not apply if—

(a) the defendant's appearance had changed significantly between the time the offence was committed and the time the defendant was taken into the custody; or

(b) it was not reasonably practicable to make a picture of the defendant after the defendant was taken into the custody.

- (5) Picture identification evidence presented by the prosecutor is not admissible if, when the pictures were examined, the defendant was in the custody of a police officer of the police force investigating the commission of the offence with which the defendant has been charged, unless—
- (a) the defendant refused to take part in an identification parade; or
  - (b) the defendant's appearance had changed significantly between the time the offence was committed and the time the defendant was taken into the custody; or
  - (c) it would not have been reasonable to have held an identification parade that included the defendant.
- (6) Sections 114 (3) to (6) (Exclusion of visual identification evidence) apply in deciding, for subsection (5) (c), whether it would have been reasonable to have held an identification parade.
- (7) If picture identification evidence presented by the prosecutor is admitted into evidence, the judge must, on the defendant's request—
- (a) if the picture of the defendant was made after the defendant was taken into the custody—tell the jury that the picture was made after the defendant was taken into the custody; or
  - (b) otherwise—warn the jury that they must not assume that the defendant has a criminal record or has previously been charged with an offence.
- Note* Section 116 (Directions to jury) and s 165 (Unreliable evidence) also deal with warnings about identification evidence.
- (8) This section does not render inadmissible picture identification evidence presented by the prosecutor that contradicts or qualifies picture identification evidence presented by the defendant.
- (9) This section applies in addition to section 114 (Exclusion of visual identification evidence).
- (10) In this section:

- (a) a reference to a picture includes a reference to a photograph;  
and
- (b) a reference to making a picture includes a reference to taking a  
photograph.

**116 Directions to jury**

- (1) If identification evidence has been admitted, the judge must tell the jury—
  - (a) that there is a special need for caution before accepting  
identification evidence; and
  - (b) of the reasons for the need for caution, both generally and in  
the circumstances of the case.
- (2) It is not necessary that a particular form of words be used in telling  
the jury.

## **Part 3.10                      Privileges**

### **Division 3.10.1              Client legal privilege**

#### **117              Definitions—div 3.10.1**

(1) In this division:

*client* includes the following:

- (a) an entity that engages a lawyer to provide legal services or that employs a lawyer (including under a contract of service);
- (b) an employee or agent of a client;
- (c) an employer of a lawyer if the employer is—
  - (i) the Commonwealth or a State or Territory; or
  - (ii) a body established by a law of the Commonwealth or a State or Territory;
- (d) if, under a law of a State or Territory relating to people of unsound mind, a manager, committee or person (however described) is acting in relation to the person, estate or property of a client—the manager, committee or person;
- (e) if a client has died—the client’s personal representative;
- (f) a successor to the rights and obligations of a client, that are rights and obligations in relation to which a confidential communication was made.

*confidential communication* means a communication made in circumstances that, when it was made—

- (a) the person who made it; or
- (b) the person to whom it was made;

was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law.

**confidential document** means a document prepared in circumstances that, when it was prepared—

- (a) the person who prepared it; or
- (b) the person for whom it was prepared;

was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law.

**lawyer** means—

- (a) an Australian lawyer; and
- (b) an Australian-registered foreign lawyer; and
- (c) an overseas-registered foreign lawyer or an individual who, under the law of a foreign country, is permitted to engage in legal practice in that country; and
- (d) an employee or agent of a lawyer mentioned in paragraph (a), (b) or (c).

**party** includes the following:

- (a) an employee or agent of a party;
  - (b) if, under a law of a State or Territory relating to people of unsound mind, a manager, committee or person (however described) is acting in relation to the person, estate or property of a party—the manager, committee or person;
  - (c) if a party has died—the party’s personal representative;
  - (d) a successor to the rights and obligations of a party, that are rights and obligations in relation to which a confidential communication was made.
- (2) A reference in this division to the commission of an act includes a reference to a failure to act.

**118 Legal advice**

Evidence must not be presented if, on objection by a client, the court finds that presenting the evidence would result in disclosure of—

- (a) a confidential communication made between the client and a lawyer; or
- (b) a confidential communication made between 2 or more lawyers acting for the client; or
- (c) the contents of a confidential document (whether delivered or not) prepared by the client, lawyer or someone else;

for the dominant purpose of the lawyer, or 1 or more of the lawyers, providing legal advice to the client.

**119 Litigation**

Evidence must not be presented if, on objection by a client, the court finds that presenting the evidence would result in disclosure of—

- (a) a confidential communication between the client and someone else, or between a lawyer acting for the client and someone else, that was made; or
- (b) the contents of a confidential document (whether delivered or not) that was prepared;

for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.

**120 Unrepresented parties**

Evidence must not be presented if, on objection by a party who is not represented in the proceeding by a lawyer, the court finds that presenting the evidence would result in disclosure of—

- (a) a confidential communication between the party and someone else; or
- (b) the contents of a confidential document (whether delivered or not) that was prepared by or at the direction or request of the party;

for the dominant purpose of preparing for or conducting the proceeding.

**121 Loss of client legal privilege—generally**

- (1) This division does not prevent the presenting of evidence relevant to a question about the intentions, or competence in law, of a client or party who has died.
- (2) This division does not prevent the presenting of evidence if, were the evidence not presented, the court would be prevented, or it could reasonably be expected that the court would be prevented, from enforcing an order of an Australian court.
- (3) This division does not prevent the presenting of evidence of a communication or document that affects a right of a person.

**122 Loss of client legal privilege—consent and related matters**

- (1) This division does not prevent the presenting of evidence given with the consent of the client or party.
- (2) Subject to subsection (5), this division does not prevent the presenting of evidence if the client or party has acted in a way that is inconsistent with the client or party objecting to the presenting of the evidence because it would result in a disclosure mentioned in



section 118 (Legal advice), section 119 (Litigation) or section 120 (Unrepresented parties).

- (3) Without limiting subsection (2), the client or party is taken to have acted in the way mentioned in subsection (2) if—
- (a) the client or party knowingly and voluntarily disclosed the substance of the evidence to someone else; or
  - (b) the substance of the evidence has been disclosed with the express or implied consent of the client or party.
- (4) The reference in subsection (3) (a) to a knowing and voluntary disclosure does not include a reference to a disclosure by a person who was, at the time of the disclosure, an employee or agent of the client or party, or of a lawyer of the client or party, unless the employee or agent was authorised by the client, party or lawyer to make the disclosure.
- (5) A client or party is not taken to have acted in a way inconsistent with the client or party objecting to the presenting of the evidence only because—
- (a) the substance of the evidence has been disclosed—
    - (i) in the course of making a confidential communication or preparing a confidential document; or
    - (ii) as a result of duress or deception; or
    - (iii) under compulsion of law; or
    - (iv) if the client or party is a body established by, or a person holding an office under, an Australian law—to the Minister, or the Minister of the Commonwealth, the State or Territory, administering the law, or part of the law, under which the body is established or the office is held; or
  - (b) of a disclosure by a client to someone else if the disclosure is about a matter in relation to which the same lawyer is

providing, or is to provide, professional legal services to both the client and the other person; or

- (c) of a disclosure to a person with whom the client or party had, at the time of the disclosure, a common interest relating to the proceeding or an anticipated or pending Australian or overseas proceeding.
- (6) This division does not prevent the presenting of evidence of a document that a witness has used—
- (a) to try to revive the witness’s memory about a fact or opinion; or
  - (b) in a way mentioned in section 32 (Attempts to revive memory in court) or section 33 (Evidence given by police officers).

### **123 Loss of client legal privilege—defendants**

In a criminal proceeding, this division does not prevent a defendant from presenting evidence unless it is evidence of—

- (a) a confidential communication made between an associated defendant and a lawyer acting for the associated defendant in connection with the prosecution of the associated defendant; or
- (b) the contents of a confidential document prepared by an associated defendant or by a lawyer acting for an associated defendant in connection with the prosecution of the associated defendant.

*Note* *Associated defendant*—see the dictionary.

### **124 Loss of client legal privilege—joint clients**

- (1) This section only applies to a civil proceeding in connection with which 2 or more parties have, before the start of the proceeding, jointly retained a lawyer in relation to the same matter.

- (2) This division does not prevent 1 of those parties from presenting evidence of—
- (a) a communication made by any 1 of them to the lawyer; or
  - (b) the contents of a confidential document prepared by or at the direction or request of any 1 of them;
- in connection with that matter.

**125 Loss of client legal privilege—misconduct**

- (1) This division does not prevent the presenting of evidence of—
- (a) a communication made or the contents of a document prepared by a client or lawyer (or both), or a party who is not represented in the proceeding by a lawyer, in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty; or
  - (b) a communication or the contents of a document that the client or lawyer (or both), or the party, knew or ought reasonably to have known was made or prepared in furtherance of a deliberate abuse of a power.
- (2) For this section, if the commission of the fraud, offence or act, or the abuse of power, is a fact in issue and there are reasonable grounds for finding that—
- (a) the fraud, offence or act, or the abuse of power, was committed; and
  - (b) a communication was made or document prepared in furtherance of the commission of the fraud, offence or act or the abuse of power;

the court may find that the communication was made or the document was prepared as mentioned in paragraph (b).

- (3) In this section:

*power* means a power given by or under an Australian law.

## 126 Loss of client legal privilege—related communications and documents

- (1) If, because of the application of a relevant section, this division does not prevent the presenting of evidence of a communication or the contents of a document, the relevant section does not prevent the presenting of evidence of another communication or document if it is reasonably necessary to enable a proper understanding of the communication or document.

### Example

A lawyer advises his client to understate her income for the previous year to evade taxation because of her potential tax liability ‘as set out in my previous letter to you dated 11 August 1994’. In a proceeding against the taxpayer for tax evasion, evidence of the contents of the letter dated 11 August 1994 may be admissible (even if that letter would otherwise be privileged) to enable a proper understanding of the second letter.

*Note* An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see [Legislation Act](#), s 126 and s 132).

- (2) In this section:

*relevant section* means:

- (a) section 121 (Loss of client legal privilege—generally); or
- (b) section 122 (Loss of client legal privilege—consent and related matters); or
- (c) section 123 (Loss of client legal privilege—defendants); or
- (d) section 124 (Loss of client legal privilege—joint clients); or
- (e) section 125 (Loss of client legal privilege—misconduct).

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## Division 3.10.1A Professional confidential relationship privilege

### 126A Definitions—div 3.10.1A

- (1) In this division:

*confidant*—see the definition of *protected confidence*.

*harm* includes actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm (for example, shame, humiliation and fear).

*Note* An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see [Legislation Act](#), s 126 and s 132).

*protected confidence* means a communication made by a person in confidence to someone else (the *confidant*)—

- (a) in the course of a relationship in which the confidant was acting in a professional capacity; and
- (b) when the confidant was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law or can be inferred from the nature of the relationship between the person and the confidant.

*protected confider* means a person who made a protected confidence.

*protected identity information* means information about, or enabling a person to ascertain, the identity of the person who made a protected confidence.

- (2) For this division, a communication may be made in confidence even if it is made in the presence of a third party if the third party's presence is necessary to facilitate communication.

**126B Exclusion of evidence of protected confidences**

- (1) The court may direct that evidence not be presented in a proceeding if the court finds that presenting it would disclose—
  - (a) a protected confidence; or
  - (b) the contents of a document recording a protected confidence; or
  - (c) protected identity information.
- (2) The court may give a direction under this section—
  - (a) on its own initiative; or
  - (b) on the application of the protected confider or confidant (whether or not either is a party).
- (3) The court must give a direction under this section if it is satisfied that—
  - (a) it is likely that harm would or might be caused (whether directly or indirectly) to a protected confider if the evidence is presented; and
  - (b) the nature and extent of the harm outweighs the desirability of the evidence being presented.
- (4) Without limiting the matters that the court may take into account for this section, it must take into account the following matters:
  - (a) the probative value of the evidence in the proceeding;
  - (b) the importance of the evidence in the proceeding;
  - (c) the nature and gravity of the offence, cause of action or defence and the nature of the subject matter of the proceeding;
  - (d) the availability of any other evidence relating to the matters to which the protected confidence or protected identity information relates;

- (e) the likely effect of presenting evidence of the protected confidence or protected identity information, including the likelihood of harm, and the nature and extent of harm that would be caused to the protected confider;
  - (f) the means (including any ancillary orders that may be made under section 126E) available to the court to limit the harm or extent of the harm that is likely to be caused if evidence of the protected confidence or the protected identity information is disclosed;
  - (g) if the proceeding is a criminal proceeding—whether the party seeking to present evidence of the protected confidence or protected identity information is a defendant or the prosecutor;
  - (h) whether the substance of the protected confidence or the protected identity information has already been disclosed by the protected confider or someone else;
  - (i) the public interest in preserving the confidentiality of protected confidences;
  - (j) the public interest in preserving the confidentiality of protected identity information.
- (5) The court must state its reasons for giving or refusing to give a direction under this section.

**126C Loss of professional confidential relationship privilege—consent**

This division does not prevent the presenting of evidence with the protected confider's consent.

**126D Loss of professional confidential relationship privilege—misconduct**

- (1) This division does not prevent the presenting of evidence of a communication made or the contents of a document prepared in the furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty.
- (2) For this section, if the commission of the fraud, offence or act is a fact in issue and there are reasonable grounds for finding that—
  - (a) the fraud, offence or act was committed; and
  - (b) a communication was made or document prepared in furtherance of the commission of the fraud, offence or act;

the court may find that the communication was made or the document was prepared as mentioned in paragraph (b).

**126E Ancillary orders**

Without limiting any action the court may take to limit the possible harm, or extent of the harm, likely to be caused by the disclosure of evidence of a protected confidence or protected identity information, the court may—

- (a) order that all or part of the evidence be heard in closed court; and
- (b) make an order relating to the suppression of publication of all or part of the evidence given before the court as, in its opinion, is necessary to protect the safety and welfare of the protected confider.



**126F Application—div 3.10.1A**

- (1) This division extends to a protected confidence made before the commencement of this division.
- (2) This division does not apply in relation to a proceeding the hearing of which began before the commencement of this division.
- (3) This division does not apply in relation to a protected confidence within the meaning of the *Evidence (Miscellaneous Provisions) Act 1991*, division 4.5.

*Note* The [Commonwealth Act](#) does not include this subsection.

- (4) The court may give a direction under this division in relation to a protected confidence or protected identity information whether or not the protected confidence or protected identity information is privileged under another section of this part or would be privileged except for a limitation or restriction imposed by that section.
- (5) For subsection (2), the hearing of a proceeding has begun if the court has begun to take oral or written evidence in the proceeding (other than in relation to bail or any other interlocutory matter).

*Note* The [Commonwealth Act](#) and [NSW Act](#) do not include this subsection.

**Division 3.10.1C Journalist privilege**

**126J Definitions—div 3.10.1C**

In this division:

*informant* means a person who gives information to a journalist in the normal course of the journalist's work in the expectation that the information may be published in a news medium.

*journalist* means a person who is engaged and active in the publication of news and who may be given information by an informant in the expectation that the information may be published in a news medium.

*news medium* means a medium for the dissemination to the public or a section of the public of news and observations on news.

### **126K Journalist privilege relating to informant's identity**

- (1) If a journalist has promised an informant not to disclose the informant's identity, neither the journalist nor the journalist's employer is compellable to answer any question or produce any document that would disclose the informant's identity or enable that identity to be ascertained.
- (2) The court may, on the application of a party, order that subsection (1) is not to apply if it is satisfied that, having regard to the issues to be decided in the proceeding, the public interest in the disclosure of the informant's identity outweighs—
  - (a) any likely adverse effect of the disclosure on the informant or anyone else; and
  - (b) the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the news media's ability to access sources of facts.
- (3) An order under subsection (2) may be made subject to the conditions (if any) the court thinks fit.

*Note* The [Commonwealth Act](#), s 126H is equivalent to this section.

### **126L Application—div 3.10.1C**

- (1) This division extends to information given by an informant before the commencement of this division.
- (2) This division does not apply in relation to a proceeding the hearing of which began before the commencement of this division.
- (3) This division (as applied by section 131A) does not apply to a disclosure requirement mentioned in that section made before the commencement of this division.

- (4) For subsection (2), the hearing of a proceeding has begun if the court has begun to take oral or written evidence in the proceeding (other than in relation to bail or any other interlocutory matter).

*Note* The [NSW Act](#) does not include this subsection and the [Commonwealth Act](#) does not include this section.

## **Division 3.10.2 Other privileges**

### **127 Religious confessions**

- (1) A person who is or was a member of the clergy of a church or religious denomination is entitled to refuse to divulge that a religious confession was made, or the contents of a religious confession made, to the person when a member of the clergy.
- (2) Subsection (1) does not apply if the communication involved in the religious confession was made for a criminal purpose.
- (3) This section applies even if an Act provides—
- (a) that the rules of evidence do not apply or that an entity is not bound by the rules of evidence; or
  - (b) that a person is not excused from answering a question or producing a document or other thing on the ground of privilege or any other ground.

- (4) In this section:

*religious confession* means a confession made by a person to a member of the clergy in the member's professional capacity according to the ritual of the member's church or religious denomination.

**128 Privilege in relation to self-incrimination in other proceedings**

- (1) This section applies if a witness objects to giving particular evidence, or evidence on a particular matter, on the ground that the evidence may tend to prove that the witness—
  - (a) has committed an offence against or arising under an Australian law or a law of a foreign country; or
  - (b) is liable to a civil penalty.
- (2) The court must decide whether or not there are reasonable grounds for the objection.
- (3) Subject to subsection (4), if the court decides that there are reasonable grounds for the objection, the court must not require the witness to give the evidence and must tell the witness—
  - (a) that the witness need not give the evidence unless required by the court to do so under subsection (4); and
  - (b) that the court will give a certificate under this section if—
    - (i) the witness willingly gives the evidence without being required to do so under subsection (4); or
    - (ii) the witness gives the evidence after being required to do so under subsection (4); and
  - (c) of the effect of the certificate.
- (4) The court may require the witness to give the evidence if the court is satisfied that—
  - (a) the evidence does not tend to prove that the witness has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country; and
  - (b) the interests of justice require that the witness give the evidence.

- (5) If the witness either willingly gives the evidence without being required to do so under subsection (4), or gives it after being required to do so under that subsection, the court must give the witness a certificate under this section in relation to the evidence.
- (6) The court must also give a witness a certificate under this section if—
- (a) the objection has been overruled; and
  - (b) after the evidence has been given, the court finds that there were reasonable grounds for the objection.
- (7) In any proceeding in an ACT court or before any entity authorised by a territory law, or by consent of parties, to hear, receive and examine—
- (a) evidence given by a person in relation to which a certificate under this section has been given; and
  - (b) evidence of any information, document or thing obtained as a direct or indirect consequence of the person having given evidence;
- cannot be used against the person.

*Note* This subsection differs from the [Commonwealth Act](#), s 128 (7). The Commonwealth provision refers to an ‘Australian court’ instead of an ‘ACT court’.

- (8) However, subsection (7) does not apply to a criminal proceeding in relation to the falsity of the evidence.
- (9) Subsection (7) has effect despite any challenge, review, quashing or calling into question on any ground of the decision to give, or the validity of, the certificate.

- (10) If a defendant in a criminal proceeding for an offence is given a certificate under this section, subsection (7) does not apply in a proceeding that is a retrial of the defendant for the same offence or a trial of the defendant for an offence arising out of the same facts that gave rise to that offence.
- (11) In a criminal proceeding, this section does not apply in relation to the giving of evidence by a defendant, if the evidence is the defendant—
- (a) did an act the doing of which is a fact in issue; or
  - (b) had a state of mind the existence of which is a fact in issue.
- (12) A reference in this section to doing an act includes a reference to failing to act.
- (13) If a person has been given a certificate under a prescribed State or Territory provision in relation to evidence given by a person in a proceeding in a State or Territory court, the certificate has the same effect, in a proceeding to which this subsection applies, as if it had been given under this section.
- (14) For subsection (13), a *prescribed State or Territory provision* is a provision of a State or Territory law declared by regulation to be a prescribed State or Territory provision for that subsection.
- (15) Subsection (13) applies to a proceeding in relation to which this Act applies because of section 4, other than a proceeding for an offence against a Commonwealth law or for the recovery of a civil penalty under a Commonwealth law.

*Note 1* The [Commonwealth Act](#), s 128 (12) to (14) gives effect to certificates in relation to self-incriminating evidence under this Act in proceedings in federal courts and in prosecutions for Commonwealth offences.

*Note 2* Bodies corporate cannot claim this privilege—see s 187.

*Note 3* The dictionary, pt 2, s 3 sets out what is a civil penalty.

*Note 4* The [Commonwealth Act](#), s 128 (12) to (14) gives effect to certificates in relation to self-incriminating evidence under this Act in proceedings in federal courts and in prosecutions for Commonwealth offences.

*Note 5* Subsections (9) and (10) were inserted as a response to the decision of the High Court in *Cornwell v The Queen* [2007] HCA 12 (22 March 2007).

## **128A Privilege in relation to self-incrimination—exception for certain orders etc**

- (1) In this section:

***disclosure order*** means an order made by an ACT court in a civil proceeding requiring a person to disclose information as part of, or in connection with, a freezing, search or other order under the [Court Procedures Rules 2006](#), division 2.9.4 but does not include an order made by a court under the [Proceeds of Crime Act 2002](#) (Cwlth) or the [Confiscation of Criminal Assets Act 2003](#).

***relevant person*** means a person to whom a disclosure order is directed.

- (2) If a relevant person objects to complying with a disclosure order on the grounds that some or all of the information required to be disclosed may tend to prove that the person—
- (a) has committed an offence against or arising under an Australian law or a law of a foreign country; or
  - (b) is liable to a civil penalty;
- the person must—
- (c) disclose the information in relation to which no objection is taken; and

- (d) prepare an affidavit containing the information in relation to which objection is taken (the *privilege affidavit*) and deliver it to the court in a sealed envelope; and
  - (e) file and serve on each other party a separate affidavit setting out the basis of the objection.
- (3) The sealed envelope containing the privilege affidavit must not be opened except as directed by the court.
- (4) The court must decide whether or not there are reasonable grounds for the objection.
- (5) Subject to subsection (6), if the court finds that there are reasonable grounds for the objection, the court must not require the information contained in the privilege affidavit to be disclosed and must return it to the relevant person.
- (6) If the court is satisfied that—
- (a) any information disclosed in the privilege affidavit may tend to prove that the relevant person has committed an offence against or arising under, or is liable to a civil penalty under, an Australian law; and
  - (b) the information does not tend to prove that the relevant person has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country; and
  - (c) the interests of justice require the information to be disclosed;
- the court may make an order requiring all or any part of the privilege affidavit containing information mentioned in paragraph (a) to be filed and served on the parties.
- (7) If all or any part of the privilege affidavit is disclosed (including by order under subsection (6)), the court must give the relevant person a certificate in relation to the information mentioned in subsection (6) (a).



- (8) In any proceeding in an ACT court or before any entity authorised by a territory law, or by consent of parties, to hear, receive and examine evidence—
- (a) evidence of information disclosed by a relevant person in relation to which a certificate has been given under this section; and
  - (b) any information, document or thing obtained as a direct result or indirect consequence of the relevant person having disclosed that information;
- cannot be used against the person.

*Note* This subsection differs from the [Commonwealth Act](#), s 128A (8). The Commonwealth provision refers to an ‘Australian court’ instead of an ‘ACT court’.

- (9) However, subsection (8) does not apply to a criminal proceeding in relation to the falsity of the evidence.
- (10) Subsection (8) does not prevent the use against the relevant person of any information disclosed by a document—
- (a) that is an annexure or exhibit to a privilege affidavit prepared by the person in response to a disclosure order; and
  - (b) that was in existence before the order was made.
- (11) Subsection (8) has effect despite any challenge, review, quashing or calling into question on any ground of the decision to give, or the validity of, the certificate.
- (12) If a person has been given a certificate under a prescribed State or Territory provision in relation to information mentioned in subsection (6) (a), the certificate has the same effect, in a proceeding to which this subsection applies, as if it had been given under this section.

- (13) For subsection (12), a *prescribed State or Territory provision* is a provision of a State or Territory law declared by regulation to be a prescribed State or Territory provision for that subsection.
- (14) Subsection (12) applies to a proceeding in relation to which this Act applies because of section 4, other than a proceeding for an offence against a Commonwealth law or for the recovery of a civil penalty under a Commonwealth law.

*Note* The [Commonwealth Act](#) does not contain provisions corresponding to s 128A (12) to (14).

### **Division 3.10.3 Evidence excluded in the public interest**

#### **129 Exclusion of evidence of reasons for judicial etc decisions**

- (1) Evidence of the reasons for a decision made by a person who is—
- (a) a judge in an Australian or overseas proceeding; or
  - (b) an arbitrator in relation to a dispute that has been submitted to the person, or to the person and 1 or more other people, for arbitration;
- or the deliberations of the person in relation to the decision, must not be given by the person, or a person who was, in relation to the proceeding or arbitration, under the direction or control of the person.
- (2) Also, the evidence must not be given by tendering as evidence a document prepared by the person.
- (3) This section does not prevent the admission or use, in a proceeding, of published reasons for a decision.
- (4) In a proceeding, evidence of the reasons for a decision made by a member of a jury in another Australian or overseas proceeding, or of

the deliberations of a member of a jury in relation to the decision, must not be given by any of the jury members.

- (5) This section does not apply in a proceeding that is—
- (a) a prosecution for 1 or more of the following offences:
    - (i) an offence against or arising under the *Criminal Code 2002*, sections 707 to 709 or section 713;
    - (ii) an offence against or arising under the *Juries Act 1967*, section 43;
    - (iii) an offence connected with an offence mentioned in subparagraph (i) or (ii), including an offence of conspiring to commit the offence; or
  - (b) in relation to a contempt of a court; or
  - (c) an appeal from, or judicial review of, a judgment, decree, order or sentence of a court; or
  - (d) a review of an arbitral award; or
  - (e) a civil proceeding in relation to an act of a judicial officer or arbitrator that was, and that was known at the time by the judicial officer or arbitrator to be, outside the scope of the matters in relation to which the judicial officer or arbitrator had authority to act.

*Note* Subsection (5) (a) differs from the *Commonwealth Act*, s 129 (5) (a).

### **130 Exclusion of evidence of matters of state**

- (1) If the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document, the court may direct that the information or document not be presented as evidence.

- (2) The court may give a direction under subsection (1) on its own initiative or on the application of any person (whether or not the person is a party).
- (3) In deciding whether to give the direction, the court may inform itself in any way it thinks fit.
- (4) Without limiting the circumstances in which information or a document may be taken for subsection (1) to relate to matters of state, the information or document is taken for that subsection to relate to matters of state if presenting it as evidence would—
  - (a) prejudice the security, defence or international relations of Australia; or
  - (b) damage relations between the Commonwealth and a State or between 2 or more States; or
  - (c) prejudice the prevention, investigation or prosecution of an offence; or
  - (d) prejudice the prevention or investigation of, or the conduct of proceedings for recovery of civil penalties brought in relation to, other contraventions of the law; or
  - (e) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information relating to the enforcement or administration of a law of the Commonwealth or a State; or
  - (f) prejudice the proper functioning of the government of the Commonwealth or a State.
- (5) Without limiting the matters the court may take into account for subsection (1), it must take into account the following matters:
  - (a) the importance of the information or the document in the proceeding;

- (b) if the proceeding is a criminal proceeding—whether the party seeking to present evidence of the information or document is a defendant or the prosecutor;
  - (c) the nature of the offence, cause of action or defence to which the information or document relates, and the nature of the subject matter of the proceeding;
  - (d) the likely effect of presenting evidence of the information or document, and the means available to limit its publication;
  - (e) whether the substance of the information or document has already been published;
  - (f) if the proceeding is a criminal proceeding and the party seeking to present evidence of the information or document is a defendant—whether the direction is to be made subject to the condition that the prosecution be stayed.
- (6) A reference in this section to a State includes a reference to a Territory.

### **131 Exclusion of evidence of settlement negotiations**

- (1) Evidence must not be presented of—
- (a) a communication that is made between people in dispute, or between 1 or more people in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute; or
  - (b) a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute.
- (2) Subsection (1) does not apply if—
- (a) the people in dispute consent to the evidence being presented in the proceeding or, if any of the people has tendered the

- communication or document in evidence in another Australian or overseas proceeding, all the other people consent; or
- (b) the substance of the evidence has been disclosed with the express or implied consent of all the people in dispute; or
  - (c) the substance of the evidence has been partly disclosed with the express or implied consent of the people in dispute, and full disclosure of the evidence is reasonably necessary to enable a proper understanding of the other evidence that has already been presented; or
  - (d) the communication or document included a statement to the effect that it was not to be treated as confidential; or
  - (e) the evidence tends to contradict or to qualify evidence that has already been admitted about the course of an attempt to settle the dispute; or
  - (f) the proceeding in which it is sought to present the evidence is a proceeding to enforce an agreement between the people in dispute to settle the dispute, or a proceeding in which the making of the agreement is in issue; or
  - (g) evidence that has been presented in the proceeding, or an inference from evidence that has been presented in the proceeding, is likely to mislead the court unless evidence of the communication or document is presented to contradict or to qualify that evidence; or
  - (h) the communication or document is relevant to deciding liability for costs; or
  - (i) making the communication, or preparing the document, affects a right of a person; or
  - (j) the communication was made, or the document was prepared, in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty; or

- (k) one of the people in dispute, or an employee or agent of 1 of them, knew or ought reasonably to have known that the communication was made, or the document was prepared, in furtherance of a deliberate abuse of a power.
- (3) For subsection (2) (j), if commission of the fraud, offence or act is a fact in issue and there are reasonable grounds for finding that—
- (a) the fraud, offence or act was committed; and
  - (b) a communication was made or document was prepared in furtherance of the commission of the fraud, offence or act;
- the court may find that the communication was made or the document was prepared as mentioned in paragraph (b).
- (4) For subsection (2) (k), if—
- (a) the abuse of power is a fact in issue; and
  - (b) there are reasonable grounds for finding that a communication was made or document was prepared in furtherance of the abuse of power;
- the court may find that the communication was made or the document was prepared as mentioned in paragraph (b).
- (5) In this section—
- (a) a reference to a dispute is a reference to a dispute of a kind in relation to which relief may be given in an Australian or overseas proceeding; and
  - (b) a reference to an attempt to negotiate the settlement of a dispute does not include a reference to an attempt to negotiate the settlement of a criminal proceeding or an anticipated criminal proceeding; and
  - (c) a reference to a communication made by a person in dispute includes a reference to a communication made by an employee or agent of the person; and

- (d) a reference to the consent of a person in dispute includes a reference to the consent of an employee or agent of the person, if the employee or agent is authorised to consent; and
  - (e) a reference to commission of an act includes a reference to a failure to act.
- (6) In this section:
- power* means a power given by or under an Australian law.

### **Division 3.10.4 General**

#### **131A Application of div 3.10.4 to preliminary proceedings of courts**

- (1) If—
- (a) a person is required by a disclosure requirement to give information, or to produce a document, which would result in the disclosure of a communication, a document or its contents or other information mentioned in division 3.10.1, division 3.10.1A, division 3.10.1C or division 3.10.3; and
  - (b) the person objects to giving the information or providing the document;

the court must decide the objection by applying the provisions of this part (other than section 123 (Loss of client legal privilege—defendants) and section 128 (Privilege in relation to self-incrimination in other proceedings)) with any necessary modification as if the objection to giving information or producing the document were an objection to the giving or presenting of evidence.



- (2) For this section, *disclosure requirement* means a process or order of a court that requires the disclosure of information or a document and includes the following:
- (a) a summons or subpoena to produce documents or give evidence;
  - (b) pre-trial discovery;
  - (c) non-party discovery;
  - (d) interrogatories;
  - (e) a notice to produce;
  - (f) a request to produce a document under division 4.6.1 (Requests to produce documents or call witnesses).

*Note 1* The [Commonwealth Act](#), s 131A applies only to that Act, div 1A (Journalists' privilege).

*Note 2* The [Commonwealth Act](#) includes a provision (s 131B) that extends the application of that Act, div 1A to proceedings in all Australian courts for Commonwealth offences.

## **132 Court to inform of rights to make applications and objections**

If it appears to the court that a witness or party may have grounds for making an application or objection under a provision of this part, the court must satisfy itself (if there is a jury, in the jury's absence) that the witness or party is aware of the effect of the provision.

## **133 Court may inspect etc documents**

If a question arises under this part in relation to a document, the court may order that the document be produced to it and may inspect the document for the purpose of deciding the question.

**134 Inadmissibility of evidence that must not be presented or given**

Evidence that, because of this part, must not be presented or given in a proceeding is not admissible in the proceeding.

## Part 3.11 Discretionary and mandatory exclusions

### 135 General discretion to exclude evidence

The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might—

- (a) be unfairly prejudicial to a party; or
- (b) be misleading or confusing; or
- (c) cause or result in undue waste of time.

### 136 General discretion to limit use of evidence

The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might—

- (a) be unfairly prejudicial to a party; or
- (b) be misleading or confusing.

### 137 Exclusion of prejudicial evidence in criminal proceedings

In a criminal proceeding, the court must refuse to admit evidence presented by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

### 138 Exclusion of improperly or illegally obtained evidence

- (1) Evidence that was obtained—
  - (a) improperly or in contravention of an Australian law; or
  - (b) in consequence of an impropriety or of a contravention of an Australian law;

must not be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

- (2) Without limiting subsection (1), evidence of an admission that was made during or in consequence of questioning, and evidence obtained in consequence of the admission, is taken to have been obtained improperly if the person conducting the questioning—
- (a) did, or omitted to do, an act in the course of the questioning even though the person knew or ought reasonably to have known that the act or omission was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning; or
  - (b) made a false statement in the course of the questioning even though the person knew or ought reasonably to have known that the statement was false and that making the false statement was likely to cause the person who was being questioned to make an admission.
- (3) Without limiting the matters that the court may take into account under subsection (1), it must take into account—
- (a) the probative value of the evidence; and
  - (b) the importance of the evidence in the proceeding; and
  - (c) the nature of the relevant offence, cause of action or defence and the nature of the subject matter of the proceeding; and
  - (d) the gravity of the impropriety or contravention; and
  - (e) whether the impropriety or contravention was deliberate or reckless; and
  - (f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the *International Covenant on Civil and Political Rights*; and
  - (g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and

- (h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

*Note* The *International Covenant on Civil and Political Rights* is accessible at [www.legislation.act.gov.au/updates/humanrights/](http://www.legislation.act.gov.au/updates/humanrights/).

### 139 Cautioning of people

- (1) For section 138 (1) (a), evidence of a statement made or act done by a person during questioning is taken to have been obtained improperly if—
  - (a) the person was under arrest for an offence at the time; and
  - (b) the questioning was conducted by an investigating official who was at the time empowered, because of the office that the official held, to arrest the person; and
  - (c) before starting the questioning the investigating official did not caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence.
- (2) For section 138 (1) (a), evidence of a statement made or an act done by a person during questioning is taken to have been obtained improperly if—
  - (a) the questioning was conducted by an investigating official who did not have the power to arrest the person; and
  - (b) the statement was made, or the act was done, after the investigating official formed a belief that there was sufficient evidence to establish that the person has committed an offence; and
  - (c) the investigating official did not, before the statement was made or act was done, caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence.

- (3) 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 cannot hear adequately.
- (4) Subsections (1), (2) and (3) do not apply so far as any Australian law requires the person to answer questions put by, or do things required by, the investigating official.
- (5) A reference in subsection (1) to a person who is under arrest includes a reference to a person who is in the company of an investigating official for the purpose of being questioned, if—
  - (a) the official believes that there is sufficient evidence to establish that the person has committed an offence that is to be the subject of the questioning; or
  - (b) the official would not allow the person to leave if the person wished to do so; or
  - (c) the official has given the person reasonable grounds for believing that the person would not be allowed to leave if the person wished to do so.
- (6) A person is not treated as being under arrest only because of subsection (5) if—
  - (a) the official is exercising functions in relation to people or goods entering or leaving Australia and the official does not believe the person has committed an offence against a Commonwealth law; or
  - (b) the official is exercising a function under an Australian law to detain and search the person or to require the person to provide information or to answer questions.

## Chapter 4 Proof

- Note* This chapter is about the proof of matters in a proceeding.
- Pt 4.1 is about the standard of proof in civil proceedings and criminal proceedings.
  - Pt 4.2 is about matters that do not require proof in a proceeding.
  - Pt 4.3 makes easier the proof of the matters dealt with in that part.
  - Pt 4.4 is about requirements that evidence be corroborated.
  - Pt 4.5 requires judges to warn juries about the potential unreliability of certain kinds of evidence.
  - Pt 4.6 sets out procedures for proving certain other matters.

### Part 4.1 Standard of proof

#### 140 Civil proceedings—standard of proof

- (1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.
- (2) Without limiting the matters that the court may take into account in deciding whether it is satisfied, it must take into account—
  - (a) the nature of the cause of action or defence; and
  - (b) the nature of the subject matter of the proceeding; and
  - (c) the gravity of the matters alleged.

#### 141 Criminal proceedings—standard of proof

- (1) In a criminal proceeding, the court must not find the case of the prosecution proved unless it is satisfied that it has been proved beyond reasonable doubt.
- (2) In a criminal proceeding, the court must find the case of a defendant proved if it is satisfied that the case has been proved on the balance of probabilities.

**142 Admissibility of evidence—standard of proof**

- (1) Except as otherwise provided by this Act, in a proceeding the court must find that the facts necessary for deciding—
  - (a) a question whether evidence should be admitted or not admitted, whether in the exercise of a discretion or not; or
  - (b) any other question arising under this Act;have been proved if it is satisfied that they have been proved on the balance of probabilities.
- (2) In deciding whether it is satisfied, the matters that the court must take into account include—
  - (a) the importance of the evidence in the proceeding; and
  - (b) the gravity of the matters alleged in relation to the question.



## Part 4.2                      Judicial notice

### 143                      Matters of law

- (1) Proof is not required about the provisions and coming into operation (all or in part) of—
  - (a) an Act or Territory ordinance, an Imperial Act in force in Australia, a [Commonwealth Act](#), a State Act or an Act or ordinance of another Territory; or
  - (b) a regulation, rule or by-law made, or purporting to be made, under an Act or ordinance mentioned in paragraph (a); or
  - (c) a proclamation or order of the Governor-General, the Governor of a State or the Administrator or Executive of a Territory made, or purporting to be made, under an Act or ordinance mentioned in paragraph (a); or
  - (d) an instrument of a legislative character (for example, a rule of court) made, or purporting to be made, under an Act or ordinance mentioned in paragraph (a), that is an instrument required by or under a law to be published, or the making of which is required by or under a law to be notified, in any government or official gazette (however described).
- (2) A judge may inform himself or herself about those matters in any way the judge thinks fit.
- (3) A reference in this section to an Act that is an Act of an Australian Parliament includes a reference to a private Act passed by the Parliament.

*Note*                      An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see [Legislation Act](#), s 126 and s 132).

*Note*                      The [Commonwealth Act](#), s 5 extends the operation of the equivalent Commonwealth section to proceedings in all Australian courts.

#### **144 Matters of common knowledge**

- (1) Proof is not required about knowledge that is not reasonably open to question and is—
  - (a) common knowledge in the place in which the proceeding is being held or generally; or
  - (b) capable of verification by reference to a document the authority of which cannot reasonably be questioned.
- (2) The judge may acquire knowledge mentioned in subsection (1) in any way the judge thinks fit.
- (3) The court (including, if there is a jury, the jury) must take knowledge mentioned in subsection (1) into account.
- (4) The judge must give a party the opportunity to make submissions, and to refer to relevant information, relating to the acquiring or taking into account of knowledge mentioned in subsection (1) that is necessary to ensure that the party is not unfairly prejudiced.

#### **145 Certain Crown certificates**

This part does not exclude the application of the principles and rules of common law and equity relating to the effect of a certificate given by or on behalf of the Crown in relation to a matter of international affairs.

## **Part 4.3                      Facilitation of proof**

### **Division 4.3.1              General**

#### **146              Evidence produced by processes, machines and other devices**

- (1) This section applies to a document or thing—
  - (a) that is produced completely or partly by a device or process; and
  - (b) that is tendered by a party who asserts that, in producing the document or thing, the device or process has produced a particular outcome.
- (2) If it is reasonably open to find that the device or process is one that, or is of a kind that, if properly used, ordinarily produces that outcome, it is presumed (unless evidence sufficient to raise doubt about the presumption is presented) that, in producing the document or thing on the occasion in question, the device or process produced that outcome.

#### **Example**

It would not be necessary to call evidence to prove that a photocopier normally produced complete copies of documents and that it was working properly when it was used to photocopy a particular document.

*Note*      An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see [Legislation Act](#), s 126 and s 132).

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

- (1) This section applies to a document—
- (a) that is produced completely or partly by a device or process; and
  - (b) that is tendered by a party who asserts that, in producing the document, the device or process has produced a particular outcome.
- (2) If—
- (a) the document is, or was at the time it was produced, part of the records of, or kept for the purposes of, a business (whether or not the business is still in existence); and
  - (b) the device or process is or was at that time used for the purposes of the business;
- it is presumed (unless evidence sufficient to raise doubt about the presumption is presented) that, in producing the document on the occasion in question, the device or process produced that outcome.
- (3) Subsection (2) does not apply to the contents of a document that was produced—
- (a) for the purpose of conducting, or for or in contemplation of or in connection with, an Australian or overseas proceeding; or
  - (b) in connection with an investigation relating or leading to a criminal proceeding.

*Note*      The [Commonwealth Act](#), s 182 gives the [Commonwealth Act](#), s 147 a wider application in relation to Commonwealth records and certain Commonwealth documents.

**148 Evidence of certain acts of justices, Australian lawyers and notaries public**

It is presumed, unless the contrary is proved, that a document was attested or verified by, or signed or acknowledged before, a justice of the peace, Australian lawyer or notary public, if—

- (a) an Australian law requires, authorises or permits it to be attested, verified, signed or acknowledged by a justice of the peace, Australian lawyer or notary public; and
- (b) it purports to have been attested, verified, signed or acknowledged in that way.

**149 Attestation of documents**

It is not necessary to present the evidence of an attesting witness to a document (other than a testamentary document) to prove that the document was signed or attested as it purports to have been signed or attested.

*Note* The [Commonwealth Act](#), s 182 gives the [Commonwealth Act](#), s 149 a wider application in relation to Commonwealth records and certain Commonwealth documents.

**150 Seals and signatures**

- (1) If the imprint of a seal appears on a document and purports to be the imprint of—
  - (a) a Royal Great Seal; or
  - (b) the Great Seal of Australia; or
  - (c) another seal of the Commonwealth; or
  - (d) a seal of a State, another Territory or a foreign country; or

- (e) the seal of a body (including a court or a tribunal), or a body corporate, established by or under Royal Charter or by an Australian law or the law of a foreign country;

it is presumed, unless the contrary is proved, that the imprint is the imprint of the seal, and the document was sealed as it purports to have been sealed.

*Note* The [Commonwealth Act](#) has a different s (1).

- (2) If the imprint of a seal appears on a document and purports to be the imprint of the seal of an office holder, it is presumed, unless the contrary is proved, that—
  - (a) the imprint is the imprint of the seal; and
  - (b) the document was sealed by the office holder acting in the office holder's official capacity; and
  - (c) the office holder held the relevant office when the document was sealed.
- (3) If a document purports to have been signed by an office holder in the office holder's official capacity, it is presumed, unless the contrary is proved, that—
  - (a) the document was signed by the office holder acting in that capacity; and
  - (b) the office holder held the relevant office when the document was signed.
- (4) In this section:  
*office holder* means—
  - (a) the Sovereign; or
  - (b) the Governor-General; or
  - (c) the Governor of a State; or
  - (d) the Administrator of a Territory; or

- (e) a person holding any other office under an Australian law or a law of a foreign country.
- (5) This section extends to documents sealed, and documents signed, before the commencement of this section.

*Note 1* The [Commonwealth Act](#), s 5 extends the operation of the [Commonwealth Act](#), s 150 to proceedings in all Australian courts.

*Note 2* *Australian law*—see the dictionary.

## **151 Seals of bodies established under State law**

*Note* The [Commonwealth Act](#) includes a provision dealing with certain seals of bodies established by Royal Charter or a law of a State.

## **152 Documents produced from proper custody**

If a document that is or purports to be more than 20 years old is produced from proper custody, it is presumed, unless the contrary is proved, that—

- (a) the document is the document that it purports to be; and
- (b) if it purports to have been executed or attested by a person—it was executed or attested by the person.

*Note* The [Commonwealth Act](#), s 182 gives the [Commonwealth Act](#), s 152 a wider application in relation to Commonwealth records and certain Commonwealth documents.

## Division 4.3.2 Matters of official record

### 153 Gazettes and other official documents

(1) It is presumed, unless the contrary is proved, that a document purporting—

- (a) to be any government or official gazette (however described) of the Territory, the Commonwealth, a State, another Territory or a foreign country; or
- (b) to have been printed by the government printer or the government or official printer of the Commonwealth, a State or another Territory; or
- (c) to have been printed by authority of the government of the Territory, the Commonwealth, a State, another Territory or a foreign country;

is what it purports to be and was published on the day on which it purports to have been published.

(2) If—

- (a) there is produced to a court—
  - (i) a copy of any government or official gazette (however described) of the Territory, the Commonwealth, a State, another Territory or a foreign country; or
  - (ii) a document that purports to have been printed by the government printer or the government or official printer of the Commonwealth, a State or another Territory; or
  - (iii) a document that purports to have been printed by authority of the government of the Territory, the Commonwealth, a State, another Territory or a foreign country; and



- (b) the doing of an act—
  - (i) by the Governor-General or by the Governor of a State or the Administrator of a Territory; or
  - (ii) by a person authorised or empowered to do the act by an Australian law or a law of a foreign country;is notified or published in the copy or document;

it is presumed, unless the contrary is proved, that the act was done and, if the day on which the act was done appears in the copy or document, it was done on that day.

*Note* The [Commonwealth Act](#), s 5 extends the operation of the [Commonwealth Act](#), s 153 to proceedings in all Australian courts.

#### **154 Documents published by authority of Parliaments etc**

It is presumed, unless the contrary is proved, that a document purporting to have been printed by authority of an Australian Parliament, a house of an Australian Parliament, a committee of an Australian Parliament or of a house of an Australian Parliament—

- (a) is what it purports to be; and
- (b) was published on the day on which it purports to have been published.

#### **155 Evidence of official records**

- (1) Evidence of a Commonwealth record or public document of the Territory, a State or another Territory may be presented by producing a document that—
  - (a) purports to be the record or document and to be signed or sealed by—
    - (i) a Minister; or
    - (ii) a person who might reasonably be supposed to have custody of the record or document; or

- (b) purports to be a copy of or extract from the record or document that is certified to be a true copy or extract by—
  - (i) a Minister; or
  - (ii) a person who might reasonably be supposed to have custody of the record or document.
- (2) If the document is produced, it is presumed (unless evidence sufficient to raise doubt about the presumption is presented) that—
  - (a) the document is the record, public document, copy or extract that it purports to be; and
  - (b) the Minister or person—
    - (i) signed or sealed the record; or
    - (ii) certified the copy or extract as a true copy or extract.
- (3) In this section:  
*Minister* means—
  - (a) in relation to a Commonwealth record—a Commonwealth Minister; and
  - (b) in relation to a public document of a State or another Territory—a Minister of the State or Territory.

*Note 1* For the meaning of *Minister* in relation to an ACT public document, see the [Legislation Act](#), s 162.

*Note 2* Subsection (3) is not in the [Commonwealth Act](#) or [NSW Act](#).

## 155A Evidence of Commonwealth documents

*Note* The [Commonwealth Act](#) includes a provision that relates to evidence of Commonwealth documents.

## 156 Public documents

- (1) A document that purports to be a copy of, or an extract from or summary of, a public document and to have been—
  - (a) sealed with the seal of a person who, or a body that, might reasonably be supposed to have the custody of the public document; or
  - (b) certified as a copy, extract or summary by a person who might reasonably be supposed to have custody of the public document;

is presumed, unless the contrary is proved, to be a copy of the public document, or an extract from or summary of the public document.
- (2) If an officer entrusted with the custody of a public document is required by a court to produce the public document, it is sufficient compliance with the requirement for the officer to produce a copy of, or extract from, the public document if it purports to be signed and certified by the officer as a true copy or extract.
- (3) It is sufficient production of a copy or extract for subsection (2) if the officer sends it by prepaid post, or delivers it, to—
  - (a) the proper officer of the court in which it is to be produced; or
  - (b) the person before whom it is to be produced.
- (4) The court before which a copy or extract is produced under subsection (2) may direct the officer to produce the original public document.

*Note* The [Commonwealth Act](#), s 182 gives the [Commonwealth Act](#), s 156 a wider application in relation to Commonwealth records.

### 157 Public documents relating to court processes

Evidence of a public document that is a judgment, act or other process of an Australian court or foreign court, or that is a document lodged with an Australian court or foreign court, may be presented by producing a document that purports to be a copy of the public document and that—

- (a) is proved to be an examined copy; or
- (b) purports to be sealed with the seal of that court; or
- (c) purports to be signed by a judge, magistrate, registrar or other proper officer of that court.

*Note* The [Commonwealth Act](#), s 5 extends the operation of the [Commonwealth Act](#), s 157 to proceedings in all Australian courts.

### 158 Evidence of certain public documents

(1) If—

- (a) a public document, or a certified copy of a public document, of a State or another Territory is admissible for a purpose in the State or other Territory under the law of the State or other Territory; and
- (b) it purports to be sealed, or signed and sealed, or signed alone, as directed by the law of the State or other Territory;

it is admissible in evidence to the same extent and for that purpose in all ACT courts—

- (c) without proof of—
  - (i) the seal or signature; or
  - (ii) the official character of the person appearing to have signed it; and
- (d) without further proof in every case in which the original document could have been received in evidence.

- (2) A public document of a State or another Territory that is admissible in evidence for any purpose in the State or other Territory under the law of that State or Territory without proof of—
- (a) the seal or signature authenticating the document; or
  - (b) the judicial or official character of the person appearing to have signed the document;
- is admissible in evidence to the same extent and for any purpose in all ACT courts without that proof.
- (3) This section only applies to documents that are public records of a State or another Territory.

**159 Official statistics**

A document that purports—

- (a) to be published by the Australian statistician; and
- (b) to contain statistics or abstracts compiled and analysed by the Australian statistician under the *Census and Statistics Act 1905* (Cwlth);

is evidence that the statistics or abstracts were compiled and analysed by the Australian statistician under that Act.

*Note* The [Commonwealth Act](#), s 5 extends the operation of the [Commonwealth Act](#), s 159 to proceedings in all Australian courts.

## Division 4.3.3 Matters relating to post and communications

### 160 Postal articles

- (1) It is presumed (unless evidence sufficient to raise doubt about the presumption is presented) that a postal article sent by prepaid post addressed to a person at a stated address in Australia or in an external territory was received at that address on the fourth working day after the day it was posted.
- (2) This section does not apply if—
  - (a) the proceeding relates to a contract; and
  - (b) all the parties to the proceeding are parties to the contract; and
  - (c) subsection (1) is inconsistent with a term of the contract.
- (3) In this section:  
*working day* means a day that is not—
  - (a) a Saturday or a Sunday; or
  - (b) a public holiday or a bank holiday in the place to which the postal article was addressed.

*Note* The [Commonwealth Act](#), s 182 gives the [Commonwealth Act](#), s 160 a wider application in relation to postal articles sent by a Commonwealth agency.

### 161 Electronic communications

- (1) If a document purports to contain a record of an electronic communication other than one mentioned in section 162, it is presumed (unless evidence sufficient to raise doubt about the presumption is presented) that the communication—
  - (a) was sent or made in the form of electronic communication that appears from the document to have been the form by which it was sent or made; and

- (b) was sent or made by or on behalf of the person by or on whose behalf it appears from the document to have been sent or made; and
  - (c) was sent or made on the day on which, at the time at which and from the place from which it appears from the document to have been sent or made; and
  - (d) was received at the destination to which it appears from the document to have been sent; and
  - (e) if it appears from the document that the sending of the communication ended at a particular time—was received at that destination at that time.
- (2) This section does not apply if—
- (a) the proceeding relates to a contract; and
  - (b) all the parties to the proceeding are parties to the contract; and
  - (c) subsection (1) is inconsistent with a term of the contract.

*Note* The [Commonwealth Act](#), s 182 gives the [Commonwealth Act](#), s 161 a wider application in relation to Commonwealth records.

## **162 Lettergrams and telegrams**

- (1) If a document purports to contain a record of a message transmitted by means of a lettergram or telegram, it is presumed (unless evidence sufficient to raise doubt about the presumption is presented) that the message was received by the person to whom it was addressed 24 hours after the message was delivered to a post office for transmission as a lettergram or telegram.
- (2) This section does not apply if—
- (a) the proceeding relates to a contract; and
  - (b) all the parties to the proceeding are parties to the contract; and

(c) subsection (1) is inconsistent with a term of the contract.

*Note* The [Commonwealth Act](#), s 182 gives the [Commonwealth Act](#), s 162 a wider application in relation to Commonwealth records.

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

*Note* The [Commonwealth Act](#), s 163 includes a presumption about letters sent by Commonwealth agencies. The [Commonwealth Act](#), s 5 extends the operation of the [Commonwealth Act](#), s 163 to proceedings in all Australian courts.



## Part 4.4 Corroboration

### 164 Corroboration requirements abolished

- (1) It is not necessary that evidence on which a party relies be corroborated.
- (2) Subsection (1) does not affect the operation of a rule of law that requires corroboration in relation to the offence of perjury or a similar or related offence.
- (3) Despite any rule, whether of law or practice, to the contrary, but subject to the other provisions of this Act, if there is a jury, it is not necessary that the judge—
  - (a) warn the jury that it is dangerous to act on uncorroborated evidence or give a warning to the same or similar effect; or
  - (b) give a direction relating to the absence of corroboration.

## Part 4.5 Warnings and information

### 165 Unreliable evidence

- (1) This section applies to evidence of a kind that may be unreliable, including the following kinds of evidence:
  - (a) evidence in relation to which part 3.2 (Hearsay) or part 3.4 (Admissions) applies;
  - (b) identification evidence;
  - (c) evidence the reliability of which may be affected by age, ill health (whether physical or mental), injury or the like;
  - (d) evidence given in a criminal proceeding by a witness who might reasonably be supposed to have been criminally concerned in the events giving rise to the proceeding;
  - (e) evidence given in a criminal proceeding by a witness who is a prison informer;
  - (f) oral evidence of questioning by an investigating official of a defendant that is recorded in writing and has not been signed, or otherwise acknowledged in writing, by the defendant;
  - (g) in a proceeding against the estate of a deceased person—evidence presented by or on behalf of a person seeking relief in the proceeding about a matter about which the deceased person could have given evidence if the deceased person were alive.
- (2) If there is a jury and a party requests, the judge must—
  - (a) warn the jury that the evidence may be unreliable; and
  - (b) tell the jury about matters that may cause it to be unreliable; and
  - (c) warn the jury of the need for caution in deciding whether to accept the evidence and the weight to be given to it.

- (3) The judge need not comply with subsection (2) if there are good reasons for not doing so.
- (4) It is not necessary that a particular form of words be used in giving the warning or information.
- (5) This section does not affect any other power of the judge to give a warning to, or to inform, the jury.
- (6) Subsection (2) does not permit a judge to warn or tell a jury in proceedings before it in which a child gives evidence that the reliability of the child's evidence may be affected by the age of the child.
- (7) Any warning or information in relation to that matter may be given only in accordance with section 165A (2) and (3).

**165A Warnings in relation to children's evidence**

- (1) A judge in a proceeding in which evidence is given by a child before a jury must not do any of the following:
  - (a) warn the jury, or suggest to the jury, that children as a class are unreliable witnesses;
  - (b) warn the jury, or suggest to the jury, that the evidence of children as a class is inherently less credible or reliable, or requires more careful scrutiny, than the evidence of adults;
  - (c) give a warning, or suggestion to the jury, about the unreliability of the particular child's evidence solely on account of the child's age;
  - (d) in a criminal proceeding—give a general warning to the jury of the danger of convicting on the uncorroborated evidence of a witness who is a child.

- (2) Subsection (1) does not prevent the judge, at the request of a party, from—
- (a) telling the jury that the evidence of the particular child may be unreliable and the reasons why it may be unreliable; and
  - (b) warning or telling the jury about the need for caution in deciding whether to accept the evidence of the particular child and the weight to be given to it;

if the party has satisfied the court that there are circumstances (other than solely the age of the child) particular to the child that affect the reliability of the child's evidence and that warrant the giving of the warning or information.

- (3) This section does not affect any other power of a judge to give a warning to, or to inform, the jury.

#### **165B Delay in prosecution**

- (1) This section applies in a criminal proceeding in which there is a jury.
- (2) If the court, on application by the defendant, is satisfied that the defendant has suffered a significant forensic disadvantage because of the consequences of delay, the court must tell the jury about the nature of that disadvantage and the need to take that disadvantage into account when considering the evidence.
- (3) The judge need not comply with subsection (2) if there is a good reason for not doing so.
- (4) It is not necessary that a particular form of words be used in telling the jury about the nature of the significant forensic disadvantage suffered and the need to take the disadvantage into account, but the judge must not in any way suggest to the jury that it would be dangerous or unsafe to convict the defendant solely because of the delay or the forensic disadvantage suffered because of the consequences of the delay.

- (5) The judge must not warn or tell the jury about any forensic disadvantage the defendant may have suffered because of delay except in accordance with this section, but this section does not affect any other power of the judge to give a warning to, or to inform, the jury.
- (6) For this section:
  - (a) delay includes delay between the alleged offence and its being reported; and
  - (b) significant forensic disadvantage is not to be regarded as being established by the mere existence of a delay.

## Part 4.6 Ancillary provisions

### Division 4.6.1 Requests to produce documents or call witnesses

*Note* The [Commonwealth Act](#), s 182 gives the [Commonwealth Act](#), pt 4.6, div 1 a wider application in relation to Commonwealth records and certain Commonwealth documents.

#### 166 Meaning of *request*—div 4.6.1

In this division:

*request* means a request that a party (the *requesting party*) makes to another party to do 1 or more of the following:

- (a) to produce to the requesting party all or part of a stated document or thing;
- (b) to permit the requesting party, adequately and in an appropriate way, to examine, test or copy all or part of a stated document or thing;
- (c) to call as a witness a stated person believed to be concerned in production or maintenance of a stated document or thing;
- (d) to call as a witness a stated person in whose possession or under whose control a stated document or thing is believed to be or to have been at any time;
- (e) in relation to a document of the kind mentioned in the dictionary, part 2, section 8, definition of *document*, paragraph (b) or (c)—to permit the requesting party, adequately and in an appropriate way, to examine and test the document and the way in which it was produced and has been kept;
- (f) in relation to evidence of a previous representation—to call as a witness the person who made the previous representation;

- (g) in relation to evidence that a person has been convicted of an offence, that is evidence to which section 92 (2) (Exceptions) applies—to call as a witness a person who gave evidence in the proceeding in which the person was convicted of the offence.

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

A party may make a reasonable request to another party for the purpose of deciding a question that relates to—

- (a) a previous representation; or
- (b) evidence of a conviction of a person for an offence; or
- (c) the authenticity, identity or admissibility of a document or thing.

**168 Time limits for making certain requests**

- (1) If a party has given to another party written notice of its intention to present evidence of a previous representation, the other party may only make a request to the party relating to the representation if the request is made before the end of 21 days after the day the notice is given.
- (2) Despite subsection (1), the court may give the other party leave to make a request relating to the representation after the end of the 21-day period if it is satisfied that there is good reason to do so.
- (3) If a party has given to another party written notice of its intention to present evidence of a person's conviction of an offence in order to prove a fact in issue, the other party may only make a request relating to evidence of the conviction if the request is made before the end of 21 days after the day the notice is given.
- (4) Despite subsection (3), the court may give the other party leave to make a request relating to evidence of the conviction after the end of the 21-day period if it is satisfied that there is good reason to do so.

- (5) If a party has served on another party a copy of a document that it intends to tender in evidence, the other party may only make a request relating to the document if the request is made before the end of 21 days after the day the copy is served.
- (6) If the copy of the document served under subsection (5) is accompanied by, or has endorsed on it, a notice stating that the document must be tendered to prove the contents of another document, the other party may only make a request relating to the other document if the request is made before the end of 21 days after the day the copy is served.
- (7) Despite subsections (5) and (6), the court may give the other party leave to make a request relating to the document, or other document, after the end of the 21-day period if it is satisfied that there is good reason to do so.

## 169 Failure to comply with requests

- (1) If a party has, without reasonable cause, failed to comply with a request mentioned in section 168, the court may, on application, make 1 or more of the following orders:
  - (a) an order directing the party to comply with the request;
  - (b) an order that the party produce a stated document or thing, or call as a witness a stated person, as mentioned in section 166 (Meaning of *request*—div 4.6.1);
  - (c) an order that the evidence in relation to which the request was made is not to be admitted in evidence;
  - (d) an order in relation to adjournment or costs that is just.

*Note* **Fail** includes refuse (see [Legislation Act](#), dict, pt 1).
- (2) If the party had, within a reasonable time after receiving the request, told the other party that it refuses to comply with the request, any application under subsection (1) by the other party must be made within a reasonable time after being told about the refusal.



- (3) The court may, on application, direct that evidence in relation to which a request was made must not be admitted in evidence if an order made by it under subsection (1) (a) or (b) is not complied with.
- (4) Without limiting the circumstances that may constitute reasonable cause for a party to fail to comply with a request, it is reasonable cause to fail to comply with a request if—
  - (a) the document or thing to be produced is not available to the party; or
  - (b) the existence and contents of the document are not in issue in the proceeding in which evidence of the document is proposed to be presented; or
  - (c) the person to be called as a witness is not available.
- (5) Without limiting the matters that the court may take into account in relation to the exercise of a power under subsection (1), it must take into account—
  - (a) the importance in the proceeding of the evidence in relation to which the request was made; and
  - (b) whether there is likely to be a dispute about the matter to which the evidence relates; and
  - (c) whether there is a reasonable doubt as to the authenticity or accuracy of the evidence that is, or the document the contents of which are, sought to be proved; and
  - (d) whether there is a reasonable doubt as to the authenticity of the document or thing that is sought to be tendered; and
  - (e) if the request relates to evidence of a previous representation—whether there is a reasonable doubt as to the accuracy of the representation or of the evidence on which it was based; and

- (f) for a request mentioned in section 166, definition of *request*, paragraph (g)—whether someone else is available to give evidence about the conviction or the facts that were in issue in the proceeding in which the conviction was obtained; and
- (g) whether compliance with the request would involve undue expense or delay or would not be reasonably practicable; and
- (h) the nature of the proceeding.

*Note* The dictionary, pt 2, s 5 is about the availability of documents and things and pt 2, s 4 is about the availability of people.

## Division 4.6.2 Proof of certain matters by affidavits or written statements

### 170 Evidence relating to certain matters

- (1) Evidence of a fact that is, because of a provision of this Act mentioned in table 170, to be proved in relation to a document or thing may be given by a person permitted under section 171 to give the evidence.

**Table 170**

column 1 item	column 2 provisions of this Act	column 3 subject matter
1	section 48	proof of contents of documents
2	section 63, section 64 and section 65	hearsay exceptions for first-hand hearsay
3	section 69	hearsay exception for business records
4	section 70	hearsay exception for tags, labels and other writing
5	section 71	hearsay exception for electronic communications
6	the provisions of	facilitation of proof

<b>column 1 item</b>	<b>column 2 provisions of this Act</b>	<b>column 3 subject matter</b>
	part 4.3	

*Note* The [Commonwealth Act](#), s 170, table includes a reference to the [Commonwealth Act](#), s 182 (Commonwealth records).

- (2) Evidence may be given by affidavit or, if the evidence relates to a public document, by a written statement.

## **171 People who may give evidence mentioned in s 170**

- (1) Evidence mentioned in section 170 may be given by—
- (a) a person who, at the relevant time or afterwards, had a position of responsibility in relation to making or keeping the document or thing; or
  - (b) except in the case of evidence of a fact that is to be proved in relation to a document or thing because of section 63 (Exception—civil proceedings if maker not available), section 64 (Exception—civil proceedings if maker available) or section 65 (Exception—criminal proceedings if maker not available)—an authorised person.
- (2) Despite subsection (1) (b), evidence must not be given under this section by an authorised person who, at the relevant time or afterwards, did not have a position of responsibility in relation to making or keeping the document or thing unless it appears to the court that—
- (a) it is not reasonably practicable for the evidence to be given by a person who had, at the relevant time or afterwards, a position of responsibility in relation to making or keeping the document or thing; or
  - (b) having regard to all the circumstances of the case, undue expense would be caused by calling the person mentioned in paragraph (a) as a witness.

(3) In this section:

*authorised person* means—

- (a) a person before whom an oath, declaration or affidavit may be taken or made outside the ACT (including outside Australia) under the *Oaths and Affirmations Act 1984*, section 11 (Authority to administer oath etc); or
- (b) a police officer of or above the rank of sergeant; or
- (c) a person authorised by the Minister for this section.

*Note 1* *Oath* includes affirmation (see *Legislation Act*, dict, pt 1).

*Note 2* The *Commonwealth Act* and *NSW Act* contain a different definition of *authorised person*.

## **172 Evidence based on knowledge, belief or information**

- (1) Despite chapter 3, the evidence may include evidence based on the knowledge and belief of the person who gives it, or on information that the person has.
- (2) An affidavit or statement that includes evidence based on knowledge, information or belief must set out the source of the knowledge or information or the basis of the belief.

## **173 Notification of other parties**

- (1) A copy of the affidavit or statement must be served on each party a reasonable time before the hearing of the proceeding.
- (2) The party who tenders the affidavit or statement must, if another party requests, call the deponent or person who made the statement to give evidence but need not otherwise do so.

## **Division 4.6.3 Foreign law**

### **174 Evidence of foreign law**

- (1) Evidence of a statute, proclamation, treaty or act of state of a foreign country may be presented in a proceeding by producing—
  - (a) a book or pamphlet, containing the statute, proclamation, treaty or act of state, that purports to have been printed by the government or official printer of the country or by authority of the government or administration of the country; or
  - (b) a book or other publication, containing the statute, proclamation, treaty or act of state, that appears to the court to be a reliable source of information; or
  - (c) a book or pamphlet that is or would be used in the courts of the country to inform the courts about, or to prove, the statute, proclamation, treaty or act of state; or
  - (d) a copy of the statute, proclamation, treaty or act of state that is proved to be an examined copy.
- (2) A reference in this section to a statute of a foreign country includes a reference to a regulation or by-law of the country.

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

- (1) Evidence of the unwritten or common law of a foreign country may be presented by producing a book containing reports of judgments of courts of the country if the book is or would be used in the courts of the country to inform the courts about the unwritten or common law of the country.
- (2) Evidence of the interpretation of a statute of a foreign country may be presented by producing a book containing reports of judgments of courts of the country if the book is or would be used in the courts of the country to inform the courts about the interpretation of the statute.

**176 Questions of foreign law to be decided by judge**

If, in a proceeding in which there is a jury, it is necessary to ascertain the law of another country which is applicable to the facts of the case, any question as to the effect of the evidence presented in relation to that law is to be decided by the judge alone.

**Division 4.6.4 Procedures for proving other matters**

**177 Certificates of expert evidence**

- (1) Evidence of a person's opinion may be presented by tendering a certificate (an *expert certificate*) signed by the person that—
  - (a) states the person's name and address; and
  - (b) states that the person has specialised knowledge based on the person's training, study or experience, as stated in the certificate; and
  - (c) sets out an opinion that the person holds and that is expressed to be completely or substantially based on that knowledge.
- (2) Subsection (1) does not apply unless the party seeking to tender the expert certificate has served on each other party—
  - (a) a copy of the certificate; and
  - (b) a written notice stating that the party proposes to tender the certificate as evidence of the opinion.
- (3) Service must be effected not later than—
  - (a) 21 days before the day of the hearing; or
  - (b) if, on application by the party before or after service, the court substitutes a different period—the beginning of that period.
- (4) Service for subsection (2) may be proved by affidavit.

- (5) A party on whom the documents mentioned in subsection (2) are served may, by written notice served on the party proposing to tender the expert certificate, require the party to call the person who signed the certificate to give evidence.
- (6) The expert certificate is not admissible as evidence if a requirement mentioned in subsection (5) is made.
- (7) The court may make an order in relation to costs that it considers just against a party who has, without reasonable cause, required a party to call a person to give evidence under this section.

## **178 Convictions, acquittals and other judicial proceedings**

- (1) This section applies to the following facts:
  - (a) the conviction or acquittal before or by an applicable court of a person charged with an offence;
  - (b) the sentencing of a person to any punishment or pecuniary penalty by an applicable court;
  - (c) an order by an applicable court;
  - (d) the pendency or existence at any time before an applicable court of a civil or criminal proceeding.
- (2) Evidence of a fact to which this section applies may be given by a certificate signed by a judge, magistrate or registrar or other proper officer of the applicable court—
  - (a) showing the fact, or purporting to contain particulars, of the record, indictment, conviction, acquittal, sentence, order or proceeding in question; and
  - (b) stating the time and place of the conviction, acquittal, sentence, order or proceeding; and
  - (c) stating the title of the applicable court.

- (3) A certificate given under this section showing a conviction, acquittal, sentence or order is also evidence of the particular offence or matter in relation to which the conviction, acquittal, sentence or order was had, passed or made, if stated in the certificate.
- (4) A certificate given under this section showing the pendency or existence of a proceeding is also evidence of the particular nature and occasion, or ground and cause, of the proceeding, if stated in the certificate.
- (5) A certificate given under this section purporting to contain particulars of a record, indictment, conviction, acquittal, sentence, order or proceeding is also evidence of the matters stated in the certificate.

- (6) In this section:

*acquittal* includes the dismissal of the charge in question by an applicable court.

*applicable court* means an Australian court or foreign court.

*Note* Section 91 excludes evidence of certain judgments and convictions.

**179 Proof of identity of convicted people—affidavits by members of State or Territory police forces**

- (1) This section applies if a member of a police force of a State or Territory—
  - (a) makes an affidavit in the form prescribed by regulation; and
  - (b) states in the affidavit that the member is a fingerprint expert for that police force.
- (2) For the purpose of proving before a court the identity of a person alleged to have been convicted in that State or Territory of an offence, the affidavit is evidence in a proceeding that the person whose fingerprints are shown on a fingerprint card mentioned in the affidavit and marked for identification—



- (a) is the person mentioned in a certificate of conviction, or certified copy of conviction annexed to the affidavit, as having been convicted of an offence; and
  - (b) was convicted of the offence; and
  - (c) was convicted of any other offence of which the person is stated in the affidavit to have been convicted.
- (3) For this section, if a Territory does not have its own police force, the police force exercising the policing functions of that Territory is taken to be the police force of that Territory.

**180 Proof of identity of convicted people—affidavits by members of Australian Federal Police**

- (1) This section applies if a member of the Australian Federal Police—
- (a) makes an affidavit in the form prescribed by regulation; and
  - (b) states in the affidavit that the member is a fingerprint expert for the Australian Federal Police.
- (2) For the purpose of proving before a court the identity of a person alleged to have been convicted of an offence against a Commonwealth law, the affidavit is evidence in a proceeding that the person whose fingerprints are shown on a fingerprint card mentioned in the affidavit and marked for identification—
- (a) is the person mentioned in a certificate of conviction, or certified copy of conviction annexed to the affidavit, as having been convicted of an offence; and
  - (b) was convicted of the offence; and
  - (c) was convicted of any other offence of which the person is stated in the affidavit to have been convicted.

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

- (1) The service, giving or sending under an Australian law of a written notification, notice, order or direction may be proved by affidavit of the person who served, gave or sent it.
- (2) A person who, for the purposes of a proceeding, makes an affidavit mentioned in this section is not, because of making the affidavit, excused from attending for cross-examination if required to do so by a party to the proceeding.

## Chapter 5                      Miscellaneous

### 182                      **Application of certain sections in relation to Commonwealth records**

*Note*                      The [Commonwealth Act](#) includes a provision that extends the operation of certain provisions of that Act to Commonwealth records.

### 183                      **Inferences**

If a question arises about the application of a provision of this Act in relation to a document or thing, the court may—

- (a) examine the document or thing; and
- (b) draw any reasonable inferences from it as well as from other matters from which inferences may properly be drawn.

*Note*                      The [Commonwealth Act](#), s 182 gives the [Commonwealth Act](#), s 183 a wider application in relation to Commonwealth records and certain Commonwealth documents.

### 184                      **Accused may admit matters and give consents**

- (1) In or before a criminal proceeding, a defendant may—
  - (a) admit matters of fact; and
  - (b) give any consent;that a party to a civil proceeding may make or give.
- (2) A defendant's admission or consent is not effective for subsection (1) unless—
  - (a) the defendant has been advised to do so by the defendant's Australian legal practitioner or legal counsel; or
  - (b) the court is satisfied that the defendant understands the consequences of making the admission or giving the consent.

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

*Note* The [Commonwealth Act](#) includes a provision requiring faith and credit to be given to the public acts, records and judicial proceedings of a State or Territory.

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

*Note* The [Commonwealth Act](#) includes a provision about swearing of affidavits before justices of the peace, notaries public and lawyers for use in court proceedings involving the exercise of federal jurisdiction and in courts of a Territory.

**187 No privilege against self-incrimination for bodies corporate**

- (1) This section applies if, under a territory law or in a proceeding, a body corporate is required to—
  - (a) answer a question or give information; or
  - (b) produce a document or anything else; or
  - (c) do any other act.
- (2) The body corporate is not entitled to fail to comply with the requirement on the ground that answering the question, giving the information, producing the document or other thing or doing the other act might tend to incriminate the body or make the body liable to a penalty.

*Note* **Fail** includes refuse (see [Legislation Act](#), dict, pt 1).

**188 Impounding documents**

The court may direct that a document that has been tendered or produced before the court (whether or not it is admitted in evidence) must be impounded and kept in the custody of an officer of the court or someone else for the period, and subject to the conditions, that the court thinks fit.

**189 The *voir dire***

- (1) If the decision about a question whether—
  - (a) evidence should be admitted (whether in the exercise of a discretion or not); or
  - (b) evidence can be used against a person; or
  - (c) a witness is competent or compellable;depends on the court finding that a particular fact exists, the question whether that fact exists is, for this section, a preliminary question.
- (2) If there is a jury, a preliminary question whether—
  - (a) particular evidence is evidence of an admission, or evidence to which section 138 (Exclusion of improperly or illegally obtained evidence) applies; or
  - (b) evidence of an admission, or evidence to which section 138 applies, should be admitted;is to be heard and decided in the jury's absence.
- (3) In the hearing of a preliminary question about whether a defendant's admission should be admitted into evidence (whether in the exercise of a discretion or not) in a criminal proceeding, the issue of the admission's truth or untruth is to be disregarded unless the issue is introduced by the defendant.

- (4) If there is a jury, the jury must not be present at a hearing to decide any other preliminary question unless the court otherwise orders.
- (5) Without limiting the matters that the court may take into account in deciding whether to make an order under subsection (4), it must take into account—
  - (a) whether the evidence to be presented in the course of the hearing is likely to be prejudicial to the defendant; and
  - (b) whether the evidence will be presented in the course of the hearing to decide the preliminary question; and
  - (c) whether the evidence to be presented in the course of the hearing would be admitted if presented at another stage of the hearing (other than in another hearing to decide a preliminary question or, in a criminal proceeding, a hearing in relation to sentencing).
- (6) Section 128 (11) (Privilege in relation to self-incrimination in other proceedings) does not apply to a hearing to decide a preliminary question.
- (7) In the application of chapter 3 to a hearing to decide a preliminary question, the facts in issue are taken to include the fact to which the hearing relates.
- (8) If a jury in a proceeding was not present at a hearing to decide a preliminary question, evidence must not be presented in the proceeding of evidence given by a witness at the hearing unless—
  - (a) it is inconsistent with other evidence given by the witness in the proceeding; or
  - (b) the witness has died.

**190 Waiver of rules of evidence**

- (1) The court may, if the parties consent, by order dispense with the application of any 1 or more of the provisions of—
  - (a) division 2.1.3 (General rules about giving evidence), division 2.1.4 (Examination-in-chief and re-examination) or division 2.1.5 (Cross-examination); or
  - (b) part 2.2 (Documents) or 2.3 (Other evidence); or
  - (c) parts 3.2 to 3.8;in relation to particular evidence or generally.
- (2) In a criminal proceeding, a defendant's consent is not effective for subsection (1) unless—
  - (a) the defendant has been advised to consent by the defendant's Australian legal practitioner or legal counsel; or
  - (b) the court is satisfied that the defendant understands the consequences of giving the consent.
- (3) In a civil proceeding, the court may order that any 1 or more of the provisions mentioned in subsection (1) do not apply in relation to evidence if—
  - (a) the matter to which the evidence relates is not genuinely in dispute; or
  - (b) the application of the provisions would cause or involve unnecessary expense or delay.
- (4) Without limiting the matters that the court may take into account in deciding whether to exercise the power given by subsection (3), it must take into account—
  - (a) the importance of the evidence in the proceeding; and
  - (b) the nature of the cause of action or defence and the nature of the subject matter of the proceeding; and

- (c) the probative value of the evidence; and
- (d) the powers of the court (if any) to adjourn the hearing, to make another order or to give a direction in relation to the evidence.

### **191 Agreements as to facts**

- (1) In this section:

*agreed fact* means a fact that the parties to a proceeding have agreed is not, for the purposes of the proceeding, to be disputed.

- (2) In a proceeding—

- (a) evidence is not required to prove the existence of an agreed fact; and
- (b) evidence may not be presented to contradict or qualify an agreed fact;

unless the court gives leave.

- (3) Subsection (2) does not apply unless the agreed fact—

- (a) is stated in an agreement in writing signed by the parties or by Australian legal practitioners, legal counsel or prosecutors representing the parties and presented in evidence in the proceeding; or
- (b) with the leave of the court, is stated by a party before the court with the agreement of all other parties.



**192 Leave, permission or direction may be given on conditions**

- (1) If, because of this Act, a court may give any leave, permission or direction, the leave, permission or direction may be given on the conditions that the court thinks fit.
- (2) Without limiting the matters that the court may take into account in deciding whether to give the leave, permission or direction, it must take into account—
  - (a) the extent to which to do so would be likely to add unduly to, or to shorten, the length of the hearing; and
  - (b) the extent to which to do so would be unfair to a party or witness; and
  - (c) the importance of the evidence in relation to which the leave, permission or direction is sought; and
  - (d) the nature of the proceeding; and
  - (e) the power (if any) of the court to adjourn the hearing or to make another order or to give a direction in relation to the evidence.

**192A Advance rulings and findings**

Where a question arises in a proceeding, that is a question about—

- (a) the admissibility or use of evidence proposed to be presented; or
- (b) the operation of a provision of this Act or another law in relation to evidence proposed to be presented; or
- (c) the giving of leave, permission or direction under section 192;

the court may, if it considers it to be appropriate to do so, give a ruling or make a finding in relation to the question before the evidence is presented in the proceeding.

**193 Additional powers**

- (1) The powers of a court in relation to—
- (a) the discovery or inspection of documents; and
  - (b) ordering disclosure and exchange of evidence, intended evidence, documents and reports;

extend to enabling the court to make the orders that the court thinks fit (including orders about methods of inspection, adjournments and costs) to ensure that the parties to a proceeding can adequately, and in an appropriate manner, inspect documents mentioned in the dictionary, part 2, section 8, definition of *document*, paragraph (b) or (c).

- (2) The power of an entity to make rules of court extends to making rules, not inconsistent with this Act, prescribing matters—
- (a) required or permitted by this Act to be prescribed; or
  - (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

*Note* A reference to an Act includes a reference to the statutory instruments made or in force under the Act (see [Legislation Act](#), s 104).

- (3) Without limiting subsection (2), rules made under that subsection may provide for the discovery, exchange, inspection or disclosure of intended evidence, documents and reports of people intended to be called by a party to give evidence in a proceeding.
- (4) Without limiting subsection (2), rules made under that subsection may provide for the exclusion of evidence, or for its admission on stated conditions, if the rules are not complied with.

**194 Witnesses failing to attend proceedings**

*Note 1* The [NSW Act](#) includes a provision about the consequences of a witness failing to appear when called in a civil or criminal proceeding.

*Note 2* The [Commonwealth Act](#) does not include an equivalent provision to s 194. There are provisions to the same effect in federal court rules and ACT legislation applying to proceedings before federal courts and ACT courts.

**195 Prohibited question not to be published**

A person commits an offence if—

- (a) the person prints or publishes—
  - (i) a question the court has disallowed under section 41 (Improper questions); or
  - (ii) a question the court has disallowed because any answer that is likely to be given to the question would contravene the credibility rule; or
  - (iii) a question in relation to which the court has refused to give leave under part 3.7 (Credibility); and
- (b) the person does not have the court's express permission to do so.

Maximum penalty: 60 penalty units.

**196 Proceedings for offences**

*Note 1* The [NSW Act](#) includes a provision about procedures for dealing with offences against the [NSW Act](#) or regulations.

*Note 2* The [Commonwealth Act](#) does not include an equivalent provision.

**197 Regulation-making power**

The Executive may make regulations for this Act.

*Note* A regulation must be notified, and presented to the Legislative Assembly, under the [Legislation Act](#).

## Schedule 1 Oaths and affirmations

(see s 21 (4) and s 22 (3))

### Oaths by witnesses

I swear (*or the person taking the oath may promise*) by Almighty God (*or the person may name a god recognised by the person's religion*) that the evidence I give will be the truth, the whole truth and nothing but the truth.

### Oaths by interpreters

I swear (*or the person taking the oath may promise*) by Almighty God (*or the person may name a god recognised by the person's religion*) that I will well and truly interpret the evidence that will be given and do all other matters and things that are required of me in this case to the best of my ability.

### Affirmations by witnesses

I solemnly and sincerely declare and affirm that the evidence I give will be the truth, the whole truth and nothing but the truth.

### Affirmations by interpreters

I solemnly and sincerely declare and affirm that I will well and truly interpret the evidence that will be given and do all other matters and things that are required of me in this case to the best of my ability.

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## Dictionary

(see s 3)

*Note 1* The [Legislation Act](#) contains definitions and other provisions relevant to this Act.

*Note 2* For example, the [Legislation Act](#), dict, pt 1, defines the following terms:

- Australian statistician
- child
- Corporations Act
- domestic partner (see s 169 (1))
- entity
- exercise (a function)
- external territory
- fail
- foreign country
- function
- gazette
- government printer
- indictable offence (see s 190)
- individual
- Minister (see s 162)
- office
- parent
- police officer
- territory law.

## Part 1 Definitions

***ACT court*** means the Supreme Court or Magistrates Court, and includes an entity that, in exercising a function under a territory law, is required to apply the laws of evidence.

*Note* This definition differs from the definition in the [Commonwealth Act](#).

***admission*** means a previous representation that is—

- (a) made by a person who is or becomes a party to a proceeding (including a defendant in a criminal proceeding); and
- (b) adverse to the person's interest in the outcome of the proceeding.

***asserted fact***, for part 3.2 (Hearsay)—see section 59.

***associated defendant***, in relation to a defendant in a criminal proceeding, means a person against whom a prosecution has been started, but not yet completed or terminated, for—

- (a) an offence that arose in relation to the same events as those in relation to which the offence for which the defendant is being prosecuted arose; or
- (b) an offence that relates to, or is connected with, the offence for which the defendant is being prosecuted.

***Australia*** includes the external territories.

***Australian court*** means—

- (a) the High Court; or
- (b) a court exercising federal jurisdiction; or
- (c) a court of a State or Territory; or
- (d) a judge, justice or arbitrator under an Australian law; or
- (e) an entity authorised by an Australian law, or by consent of parties, to hear, receive and examine evidence; or
- (f) an entity that, in exercising a function under an Australian law, is required to apply the laws of evidence.

***Australian law*** means a law of the Commonwealth, a State or Territory.

*Note* ***Law***—see the dictionary, pt 2.

*Australian lawyer*—see the [Legal Profession Act 2006](#), dictionary.

*Australian legal practitioner*—see the [Legal Profession Act 2006](#), dictionary.

*Australian or overseas proceeding* means a proceeding (however described) in an Australian court or foreign court.

*Australian Parliament* means the Legislative Assembly, the Commonwealth Parliament, a Parliament of a State or a Legislative Assembly of another Territory.

*Australian practising certificate*—see the [Legal Profession Act 2006](#), dictionary.

*Australian-registered foreign lawyer*—see the [Legal Profession Act 2006](#), dictionary.

*Note* The [Commonwealth Act](#) and [NSW Act](#) include a definition of *Australian statistician*. In the ACT, that term is defined in the [Legislation Act](#), dictionary, pt 1.

*business*—see the dictionary, part 2, section 1.

*case* of a party means the facts in issue in relation to which the party bears the legal burden of proof.

*child*—see the dictionary, part 2, section 10 (1).

*Note* *Child* is also defined in the [Legislation Act](#), dictionary, pt 1.

*civil penalty*—see the dictionary, part 2, section 3.

*civil proceeding* means a proceeding other than a criminal proceeding.

*client*, for division 3.10.1 (Client legal privilege)—see section 117.

*coincidence evidence* means evidence of a kind mentioned in section 98 (1) that a party seeks to present for the purpose mentioned in that subsection.

*coincidence rule* means the rule mentioned in section 98 (1).

**Commonwealth Act** means the *Evidence Act 1995* (Cwlth).

*Note* The [Commonwealth Act](#) does not include this definition.

**Commonwealth-owned body corporate** means a body corporate that, were the Commonwealth a body corporate, would, for the purposes of the [Corporations Act](#), be—

- (a) a wholly-owned subsidiary of the Commonwealth; or
- (b) a wholly-owned subsidiary of another body corporate that is, under this definition, a Commonwealth-owned body corporate because of the application of paragraph (a) (including the application of that paragraph together with another application or other applications of this paragraph).

**Commonwealth record**—see the *Evidence Act 1995* (Cwlth), dictionary.

**confidant**, for division 3.10.1A (Professional confidential relationship privilege)—see section 126A (1).

**confidential communication**, for division 3.10.1 (Client legal privilege)—see section 117.

**confidential document**, for division 3.10.1 (Client legal privilege)—see section 117.

**court** means ACT court.

*Note* The [Commonwealth Act](#) does not include this definition.

**credibility**—

- (a) of a person who has made a representation that has been admitted in evidence—means the credibility of the representation, and includes the person’s ability to observe or remember facts and events about which the person made the representation; and
- (b) of a witness—means the credibility of any part or all of the evidence of the witness, and includes the witness’s ability to



observe or remember facts and events about which the witness has given, is giving or is to give evidence.

**credibility evidence**—see section 101A.

**credibility rule** means the rule mentioned in section 102.

**criminal proceeding** means a prosecution for an offence and includes—

- (a) a proceeding for the committal of a person for trial or sentence for an offence; and
- (b) a proceeding relating to bail;

but does not include a prosecution for an offence that is a prescribed taxation offence within the meaning of the *Taxation Administration Act 1953* (Cwlth), part 3.

**cross-examination**—see the dictionary, part 2, section 2 (2).

**cross-examiner** means a party who is cross-examining a witness.

*Note* The [Commonwealth Act](#) and [NSW Act](#) include a definition of *de facto partner*. In the ACT, the term *domestic partner* is used. That term is defined in the [Legislation Act](#), s 169 (1).

**document**—see the dictionary, part 2, section 8.

*Note* **Document** is also defined in the [Legislation Act](#), dictionary, pt 1.

**document in question**, for part 2.2 (Documents)—see section 47.

**electronic communication**—see the *Electronic Transactions Act 2001*, dictionary.

**examination-in-chief**—see the dictionary, part 2, section 2 (1).

*Note* The [Commonwealth Act](#) and [NSW Act](#) include a definition of *exercise* of a function. In the ACT, that term is defined in the [Legislation Act](#), dictionary, pt 1.

**fax**, in relation to a document, means a copy of the document that has been reproduced by facsimile telegraphy.

*Note* The [Commonwealth Act](#) includes a definition of **federal court**.

**foreign court** means any court (including any entity authorised to take or receive evidence, whether on behalf of a court or otherwise and whether or not the entity is empowered to require the answering of questions or the production of documents) of a foreign country or part of that country.

*Note* The [Commonwealth Act](#) and [NSW Act](#) include a definition of **function**. In the ACT, that term is defined in the [Legislation Act](#), dictionary, pt 1.

**government or official gazette** includes the gazette.

*Note 1* This definition differs from the [Commonwealth Act](#) and [NSW Act](#).

*Note 2* The [NSW Act](#) includes definitions of **Governor of a State** and **Governor-General**. In the ACT, those terms are defined in the [Legislation Act](#), dictionary, pt 1.

**harm**, for division 3.10.1A (Professional confidential relationship privilege)—see section 126A (1).

**hearsay rule** means the rule mentioned in section 59 (1).

**identification evidence** means evidence that is—

- (a) an assertion by a person to the effect that a defendant was, or resembles (visually, aurally or otherwise) a person who was, present at or near a place where—
  - (i) the offence for which the defendant is being prosecuted was committed; or
  - (ii) an act connected to the offence was done;

at or about the time at which the offence was committed or act was done, that is an assertion based completely or partly on what the person making the assertion saw, heard or otherwise perceived at that place and time; or

(b) a report (whether oral or in writing) of the assertion.

**informant**, for division 3.10.1C (Journalist privilege)—see section 126J.

**investigating official** means—

- (a) a police officer (other than a police officer who is engaged in covert investigations under the orders of a superior); or
- (b) a person appointed by or under an Australian law (other than a person who is engaged in covert investigations under the orders of a superior) whose functions include functions in relation to the prevention or investigation of offences.

**joint sitting** means—

- (a) in relation to the Commonwealth Parliament—a joint sitting of the members of the Senate and House of Representatives convened by the Governor-General under the Constitution, section 57 or convened under any Commonwealth Act; or
- (b) in relation to a bicameral legislature of a State—a joint sitting of both houses of the legislature convened under a law of the State.

**journalist**, for division 3.10.1C (Journalist privilege)—see section 126J.

**judge**, in relation to a proceeding, means the judge, magistrate or other person before whom the proceeding is being held.

**law**—see the dictionary, part 2, section 9.

**lawyer**, for division 3.10.1 (Client legal privilege)—see section 117.

**leading question** means a question asked of a witness that—

- (a) directly or indirectly suggests a particular answer to the question; or

- (b) assumes the existence of a fact the existence of which is in dispute in the proceeding and as to the existence of which the witness has not given evidence before the question is asked.

**legal counsel** means an Australian lawyer employed in or by a government agency or other body who by law is exempted from holding an Australian practising certificate, or who does not require an Australian practising certificate, to engage in legal practice in the course of that employment.

**Examples**

- 1 in-house counsel
- 2 government solicitor

*Note* An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see [Legislation Act](#), s 126 and s 132).

**Legislative Assembly**, of another Territory, includes any present or former Legislative Assembly of that Territory.

*Note* **Legislative Assembly** is also defined in the [Legislation Act](#), dictionary, pt 1.

**member** of the Australian Federal Police includes a special member or staff member of the Australian Federal Police.

**news medium**, for division 3.10.1C (Journalist privilege)—see section 126J.

**NSW Act** means the [Evidence Act 1995](#) (NSW).

*Note* The [Commonwealth Act](#) and [NSW Act](#) do not include this definition.

**offence** means an offence against or arising under an Australian law.

**opinion rule** means the rule mentioned in section 76.

**overseas-registered foreign lawyer**—see the [Legal Profession Act 2006](#), dictionary.

**parent**—see the dictionary, part 2, section 10 (2).

*party*, for division 3.10.1 (Client legal privilege)—see section 117.

*police officer* includes a member of the police force of a State or another Territory.

*Note* *Police officer* is also defined in the [Legislation Act](#), dictionary, pt 1.

*postal article*—see the [Australian Postal Corporation Act 1989](#) (Cwlth), section 3.

*previous representation*—

- (a) for this Act generally—means a representation made otherwise than in the course of giving evidence in the proceeding in which evidence of the representation is sought to be presented; and
- (b) for division 3.2.2 (First-hand hearsay) (other than section 62 (2))—see section 62.

*prior consistent statement* of a witness means a previous representation that is consistent with evidence given by the witness.

*prior inconsistent statement* of a witness means a previous representation that is inconsistent with evidence given by the witness.

*probative value* of evidence means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.

*prosecutor* means a person who starts, or is responsible for the conduct of, a prosecution.

*protected confidence*, for division 3.10.1A (Professional confidential relationship privilege)—see section 126A (1).

*protected confider*, for division 3.10.1A (Professional confidential relationship privilege)—see section 126A (1).

*protected identity information*, for division 3.10.1A (Professional confidential relationship privilege)—see section 126A (1).

**public document** means a document that—

- (a) forms part of the records of the Commonwealth, a State or a Territory; or
- (b) forms part of the records of the government of a foreign country; or
- (c) forms part of the records of an entity holding office or exercising a function under or because of the Constitution, an Australian law or a law of a foreign country; or
- (d) is being kept by or on behalf of an entity mentioned in paragraph (a), (b) or (c);

and includes the records of the proceedings of, and papers presented to—

- (e) an Australian Parliament, a house of an Australian Parliament, a committee of an Australian Parliament or of a house of an Australian Parliament; and
- (f) a legislature of a foreign country, including a house or committee (however described) of that legislature.

**re-examination**—see the dictionary, part 2, section 2 (3) and (4).

**representation** includes—

- (a) an express or implied representation (whether oral or in writing); or
- (b) a representation to be inferred from conduct; or
- (c) a representation not intended by its maker to be communicated to or seen by someone else; or
- (d) a representation that for any reason is not communicated.

**request**, for division 4.6.1 (Requests to produce documents or call witnesses)—see section 166.

**seal** includes a stamp.

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***tendency evidence*** means evidence of a kind mentioned in section 97 (1) that a party seeks to present for the purpose mentioned in that subsection.

***tendency rule*** means the rule mentioned in section 97 (1).

***traditional laws and customs*** of an Aboriginal or Torres Strait Islander group (including a kinship group) includes any of the traditions, customary laws, customs, observances, practices, knowledge and beliefs of the group.

***witness***—see the dictionary, part 2, section 7.

## Part 2                      Other expressions

### 1                      References to *business*

- (1) For this Act, a *business* includes the following:
- (a) a profession, calling, occupation, trade or undertaking;
  - (b) an activity engaged in or carried on by the Commonwealth, a State or a Territory;
  - (c) an activity engaged in or carried on by the government of a foreign country;
  - (d) for an entity holding office or exercising power under or because of the Constitution, an Australian law or a law of a foreign country—an activity engaged in or carried on by the entity in the exercise of the functions of the office or the exercise of the power (otherwise than in a private capacity);
  - (e) the proceedings of an Australian Parliament, a house of an Australian Parliament, a committee of an Australian Parliament or of a house of an Australian Parliament;
  - (f) the proceedings of a legislature of a foreign country, including a house or committee (however described) of the legislature.
- (2) For this Act, a *business* also includes the following:
- (a) a business that is not engaged in or carried on for profit;
  - (b) a business engaged in or carried on outside Australia.



## 2 References to *examination-in-chief*, *cross-examination* and *re-examination*

- (1) For this Act, a reference to *examination-in-chief* of a witness is a reference to the questioning of a witness by the party who called the witness to give evidence, other than questioning that is re-examination.
- (2) For this Act, a reference to *cross-examination* of a witness is a reference to the questioning of a witness by a party other than the party who called the witness to give evidence.
- (3) For this Act, a reference to *re-examination* of a witness is a reference to the questioning of a witness by the party who called the witness to give evidence, that is questioning (other than further examination-in-chief with the leave of the court) conducted after the cross-examination of the witness by another party.
- (4) For this Act, if a party has recalled a witness who has already given evidence, a reference to re-examination of a witness does not include a reference to the questioning of the witness by that party before the witness is questioned by another party.

## 3 References to civil penalties

For this Act, a person is taken to be liable to a civil penalty if, in an Australian or overseas proceeding (other than a criminal proceeding), the person would be liable to a penalty arising under an Australian law or a law of a foreign country.

## 4 Unavailability of people

- (1) For this Act, a person is taken not to be available to give evidence about a fact if—
  - (a) the person is dead; or

- (b) the person is, for any reason other than the application of section 16 (Competence and compellability—judges and jurors), not competent to give the evidence; or
  - (c) the person is mentally or physically unable to give the evidence and it is not reasonably practicable to overcome that inability; or
  - (d) it would be unlawful for the person to give the evidence; or
  - (e) a provision of this Act prohibits the evidence being given; or
  - (f) all reasonable steps have been taken, by the party seeking to prove the person is not available, to find the person or to secure the person's attendance, but without success; or
  - (g) all reasonable steps have been taken, by the party seeking to prove the person is not available, to compel the person to give the evidence, but without success.
- (2) In all other cases the person is taken to be available to give evidence about the fact.

## **5 Unavailability of documents and things**

For this Act, a document or thing is taken not to be available to a party if and only if—

- (a) it cannot be found after reasonable inquiry and search by the party; or
- (b) it was destroyed by the party, or by a person on behalf of the party, otherwise than in bad faith, or was destroyed by someone else; or
- (c) it would be impractical to produce the document or thing in the proceeding; or
- (d) production of the document or thing in the proceeding could render a person liable to conviction for an offence; or

- (e) it is not in the possession or under the control of the party and—
  - (i) it cannot be obtained by any judicial procedure of the court; or
  - (ii) it is in the possession or under the control of another party to the proceeding who knows or might reasonably be expected to know that evidence of the contents of the document, or evidence of the thing, is likely to be relevant in the proceeding; or
  - (iii) it was in the possession or under the control of that other party at a time when that party knew or might reasonably be expected to have known that the evidence was likely to be relevant in the proceeding.

## **6 Representations in documents**

For this Act, a representation contained in a document is taken to have been made by a person if—

- (a) the document was written, made or otherwise produced by the person; or
- (b) the representation was recognised by the person as the person's representation by signing, initialling or otherwise marking the document.

## **7 Witnesses**

- (1) For this Act, a reference to a witness includes a reference to a party giving evidence.
- (2) For this Act, a reference to a witness who has been called by a party to give evidence includes a reference to the party giving evidence.
- (3) For this section, a reference to a party includes a defendant in a criminal proceeding.

**8 References to documents**

For this Act, a reference to a document includes a reference to the following:

- (a) any part of the document;
- (b) any copy, reproduction or duplicate of the document or of any part of the document;
- (c) any part of the copy, reproduction or duplicate.

**8A References to offices etc**

For this Act—

- (a) a reference to a person appointed or holding office under or because of an Australian law includes a reference to an APS employee within the meaning of the *Public Service Act 1999* (Cwlth); and
- (b) in that context, a reference to an office is a reference to the position occupied by the APS employee and a reference to an officer includes a reference to a Secretary, or APS employee, within the meaning of that Act.

**9 References to laws**

- (1) For this Act, a reference to a law of the Commonwealth, a State, a Territory or a foreign country is a reference to a law (whether written or unwritten) of or in force in that place.
- (2) For this Act, a reference to an Australian law is a reference to an Australian law (whether written or unwritten) of or in force in Australia.

**10 References to *children and parents***

- (1) For this Act, a *child* of a person includes the following:
- (a) an adopted child of the person;
  - (b) a child of the person born outside the person's domestic partnership;
  - (c) a child living with the person as if the child were a member of the person's family.
- (2) For this Act, a *parent* of a person includes the following:
- (a) if the person is adopted—an adoptive parent of the person;
  - (b) if the person is a child mentioned in subsection (1) (b)—the person's natural father;
  - (c) if the person is a child mentioned in subsection (1) (c)—the person whose family the child is living with.

*Note* The [Commonwealth Act](#) and [NSW Act](#) include a provision about references to de facto partners.

## Endnotes

1 About the endnotes

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## Endnotes

### 1 About the endnotes

Amending and modifying laws are annotated in the legislation history and the amendment history. Current modifications are not included in the republished law but are set out in the endnotes.

Not all editorial amendments made under the *Legislation Act 2001*, part 11.3 are annotated in the amendment history. Full details of any amendments can be obtained from the Parliamentary Counsel's Office.

Uncommenced amending laws are not included in the republished law. The details of these laws are underlined in the legislation history. Uncommenced expiries are underlined in the legislation history and amendment history.

If all the provisions of the law have been renumbered, a table of renumbered provisions gives details of previous and current numbering.

The endnotes also include a table of earlier republications.

### 2 Abbreviation key

A = Act	NI = Notifiable instrument
AF = Approved form	o = order
am = amended	om = omitted/repealed
amdt = amendment	ord = ordinance
AR = Assembly resolution	orig = original
ch = chapter	par = paragraph/subparagraph
CN = Commencement notice	pres = present
def = definition	prev = previous
DI = Disallowable instrument	(prev...) = previously
dict = dictionary	pt = part
disallowed = disallowed by the Legislative Assembly	r = rule/subrule
div = division	reloc = relocated
exp = expires/expired	renum = renumbered
Gaz = gazette	R[X] = Republication No
hdg = heading	RI = reissue
IA = Interpretation Act 1967	s = section/subsection
ins = inserted/added	sch = schedule
LA = Legislation Act 2001	sdiv = subdivision
LR = legislation register	SL = Subordinate law
LRA = Legislation (Republication) Act 1996	sub = substituted
mod = modified/modification	<u>underlining</u> = whole or part not commenced or to be expired

### 3 Legislation history

#### **Evidence Act 2011 A2011-12**

notified LR 13 April 2011

s 1, s 2 commenced 13 April 2011 (LA s 75 (1))

remainder commenced 1 March 2012 (s 2 and [CN2012-4](#))

as amended by

#### **Evidence Amendment Act 2011 A2011-47**

notified LR 22 November 2011

s 1, s 2 commenced 22 November 2011 (LA s 75 (1))

remainder commenced 1 March 2012 (s 2 and see Evidence Act 2011 A2011-12, s 2 and [CN2012-4](#))

#### **Evidence (Consequential Amendments) Act 2011 A2011-48 sch 1 pt 1.18**

notified LR 22 November 2011

s 1, s 2 commenced 22 November 2011 (LA s 75 (1))

sch 1 pt 1.18 commenced 1 March 2012 (s 2 (1) and see Evidence Act 2011 A2011-12, s 2 and [CN2012-4](#))

#### **Marriage Equality (Same Sex) Act 2013 A2013-39 sch 2 pt 2.13**

notified LR 4 November 2013

s 1, s 2 commenced 4 November 2013 (LA s 75 (1))

sch 2 pt 2.13 commenced 7 November 2013 (s 2 and [CN2013-11](#))

*Note* The High Court held this Act to be of no effect (see *Commonwealth v Australian Capital Territory* [2013] HCA 55)

#### **Statute Law Amendment Act 2013 (No 2) A2013-44 sch 3 pt 3.7**

notified LR 11 November 2013

s 1, s 2 commenced 11 November 2013 (LA s 75 (1))

sch 3 pt 3.7 commenced 25 November 2013 (s 2)

## Endnotes

4 Amendment history

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### 4 Amendment history

#### Commencement

s 2 om LA s 89 (4)

#### Operation of other Acts

s 8 am [A2011-48](#) amdt 1.25, amdt 1.26

#### Exception—reputation as to relationships and age

s 73 am [A2013-39](#) amdt 2.29 ([A2013-39](#) never effective (see *Commonwealth v Australian Capital Territory* [2013] HCA 55))

#### Professional confidential relationship privilege

div 3.10.1A hdg ins [A2011-47](#) s 4

#### Definitions—div 3.10.1A

s 126A ins [A2011-47](#) s 4  
def **confidant** ins [A2011-47](#) s 4  
def **harm** ins [A2011-47](#) s 4  
def **protected confidence** ins [A2011-47](#) s 4  
def **protected confider** ins [A2011-47](#) s 4  
def **protected identity information** ins [A2011-47](#) s 4

#### Exclusion of evidence of protected confidences

s 126B ins [A2011-47](#) s 4

#### Loss of professional confidential relationship privilege—consent

s 126C ins [A2011-47](#) s 4

#### Loss of professional confidential relationship privilege—misconduct

s 126D ins [A2011-47](#) s 4

#### Ancillary orders

s 126E ins [A2011-47](#) s 4

#### Application—div 3.10.1A

s 126F ins [A2011-47](#) s 4

#### Journalist privilege

div 3.10.1C hdg ins [A2011-47](#) s 4

#### Definitions—div 3.10.1C

s 126J ins [A2011-47](#) s 4  
def **informant** ins [A2011-47](#) s 4  
def **journalist** ins [A2011-47](#) s 4  
def **news medium** ins [A2011-47](#) s 4

#### Journalist privilege relating to informant's identity

s 126K ins [A2011-47](#) s 4

#### Application—div 3.10.1C

s 126L ins [A2011-47](#) s 4



**Privilege in relation to self-incrimination in other proceedings**s 128 am [A2011-47](#) ss 5-7**Privilege in relation to self-incrimination—exception for certain orders etc**s 128A am [A2011-47](#) s 8**Application of div 3.10.4 to preliminary proceedings of courts**s 131A am [A2011-47](#) s 9, s 10**Official statistics**s 159 am [A2013-44](#) amdt 3.64**Dictionary**dict am [A2011-48](#) amdt 1.27dict pt 1 def **confidant** ins [A2011-47](#) s 11def **harm** ins [A2011-47](#) s 11def **informant** ins [A2011-47](#) s 11def **journalist** ins [A2011-47](#) s 11def **news medium** ins [A2011-47](#) s 11def **previous representation** sub [A2013-44](#) amdt 3.65def **protected confidence** ins [A2011-47](#) s 11def **protected confider** ins [A2011-47](#) s 11def **protected identity information** ins [A2011-47](#) s 11def **request** ins [A2013-44](#) amdt 3.66dict pt 2 s 4 am [A2011-47](#) s 12

## Endnotes

### 5 Earlier republications

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#### 5 Earlier republications

Some earlier republications were not numbered. The number in column 1 refers to the publication order.

Since 12 September 2001 every authorised republication has been published in electronic pdf format on the ACT legislation register. A selection of authorised republications have also been published in printed format. These republications are marked with an asterisk (\*) in column 1. Electronic and printed versions of an authorised republication are identical.

<b>Republication No and date</b>	<b>Effective</b>	<b>Last amendment made by</b>	<b>Republication for</b>
R1* 1 Mar 2012	1 Mar 2012– 6 Nov 2013	<a href="#">A2011-48</a>	new Act and amendments by <a href="#">A2011-47</a> and <a href="#">A2011-48</a>
R2 7 Nov 2013	never effective	<a href="#">A2013-39</a> (never effective)	amendments by <a href="#">A2013-39</a>
R2 (RI) 24 Feb 2014	7 Nov 2013– 24 Nov 2013	<a href="#">A2013-39</a> (never effective)	reissue because of High Court decision in relation to <a href="#">A2013-39</a>

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