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FAMILY LAW
BREAKFAST

DON'T THROW THE BABY OUT
WITH THE BATH WATER!

DIVISION 12 A OF THE FAMILY LAW ACT

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Date: 11 August, 2016

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Don't throw the baby out with the bath water!

Division 12A of the Family Law Act 1975 (Cth) and Evidence.

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Don't throw the baby out with the bath water!

Division 12A of the Family Law Act 1975 (Cth) and Evidence.

In the old days.

Life was different when I first practiced in family law. Parenting cases were strictly pleaded in the applications and responses, the rules of evidence were applied in all cases and on the first day of any hearing the affidavit material was ripped to shreds by opposing counsel with slabs of your hard work struck as inadmissible. The court process was clearly defined and there was a strict order as to the presentation of evidence.

The family law trial world changed on 1 July 2006 with the introduction of the “less adversarial trial” system. The insertion of Division 12A into the Family Law Act 1975 (Cth) (“the FLA”) brought with it a whole new regime of case management and trial process that amongst other things focused attention on the best interest of children from the outset both in terms of outcome of the proceedings and the conduct of the proceedings themselves.

The introduction of a more ‘user friendly’ trial process included the relaxing of certain admissibility requirements in relation to evidence has resulted in many legal practitioners failing to forensically consider what is the “evidence” when drafting

affidavit evidence in chief for their clients. The result is that the material in an affidavit is frequently of no assistance to their client's case and of no evidentiary value.

Despite these user friendly provisions in Division 12A and in particular section 69ZT (1)

– **DON'T THROW THE BABY OUT WITH THE BATH WATER!!!!!!**

Judicial Officers are still required to make determinations based on the "evidence" before them and it is not enough to "get the evidence in" but the evidence must be able to be attributed significant weight if it is to assist your client's case.

This paper considers Division 12A and what it actually does in general terms and specifically in relation to the use of evidence in proceedings. I hope to provide some guidance to assist you in preparing cases to ensure you maximise the impact of your client's evidence.

Division 12A –The user friendly division?

Division 12 A was inserted into the FLA in 2006 as part of a suite of provisions designed to overhaul how the family law system dealt with matters involving children. This included the simplification of the conduct of parenting proceedings in an environment where the FLA required the community to think very differently about parenting after separation.

A presumption in relation to shared parental responsibility and the mandatory requirement for the court to consider a child spending equal time with his or her parents in circumstances of equal shared parental responsibility were ground breaking concepts. These and many other changes were introduced by the Family Law Amendment (Shared Parental Responsibility) Act.2006 (Cth), ("Shared PR Act").

Many practitioners will not recall a world other than that which was introduced by the Shared PR Act in July 2006 however for those of us who have practised under the old regime, the differences particularly in relation to the conduct of proceedings are marked. The provisions in Division 12 A have led to an environment where many practitioners do not think about the evidentiary quality of the material when drafting affidavits particularly in terms of the weight a court will give to the deposed “facts”.

Division 12A was inserted in the FLA by Schedule 3 of the shared PR Act. In the second reading speech of the shared PR Bill the then Attorney General, Phillip Ruddock explained:

“The government acknowledges that adversarial processes tend to escalate and prolong conflict. For those parenting issues that do need to proceed to court, the amendments in schedule 3 of the bill contain changes to court procedures to make the process less adversarial.”¹

The Explanatory Memorandum to the Shared PR Bill says in relation to Schedule 3:

“The amendments in Schedule 3 provide for a less adversarial approach to be adopted in all child-related proceedings under the Act. This approach relies on active management by judicial officers of matters and ensures that proceedings are managed in a way that considers the impact of the proceedings themselves (not just the outcome of the proceedings) on the child. The intention is to ensure that the case management practices adopted by the courts will

¹ Second Reading Speech.

*promote the best interests of the child by encouraging parents to focus on their parenting responsibilities.*²

When does division 12A apply?

Division 12A automatically applies to proceedings under Part VII of the Act (child related proceedings).

Those proceedings which are brought under Part VII, “child related proceedings,³” are automatically caught by the division.⁴ If the proceeding are only in part under Part VII and partly another part (such as in concurrent property and parenting proceedings), to the extent that they are under the Part VII the division applies⁵. In mixed proceedings the parties may consent to the whole of the proceedings being dealt with under the division⁶. Proceedings that are not brought within Part VII may be dealt with under the division provided that the proceedings arise from the break down of the marital relationship or are a de facto cause and the parties freely consent to the proceedings being dealt with under the division⁷.

The principles of division 12A are set out in section 69ZN subsections (3), (4), (5), (6) & (7) of the FLA. In short the principles require both the Court and the parties to be child focused in their respective approaches including considering the needs of the child/children and the impact of the conduct of the proceedings on the child/children in determining how the proceedings should progress. The proceedings are to be closely

² Family Law Amendment (Shared Parental Responsibility) Bill2005 Explanatory Memoranda at page 2

³ FLA s.69ZM (4) & s.69ZM (1)

⁴ FLA s.69ZM (1)

⁵ FLA s.69ZM(2)(a)

⁶ FLA s.69ZM(2)(b)

⁷ FLA s.69ZM (3)

judge managed and conducted to “safeguard” children and parties from family violence and abuse while still attempting to promote co-operative parenting.

What does the division require of the Court and the Parties?

Section 69ZQ (1) of the FLA mandates that in giving effect to the principles of the Division the Court must; -

- (a) look at the issues and decide which of the issues can be dealt with summarily and which requires fuller investigation by the Court;
- (b) decide in what order the issues are to be decided;
- (c) give directions about the timing of steps and what has to be done for determining the matter;
- (d) weigh the costs of the steps to be taken and justification of the steps involved;
- (e) make use of the technology available;
- (f) if appropriate, direct the parties to family dispute resolution services;
- (g) deal with as many issues in the matter as can be dealt with on a single occasion;
- (h) deal where possible with the matter without requiring the physical attendance of the parties at court.

It is interesting to note that failure to comply with these requirements will not of itself invalidate the proceeding or orders made.

The court is given very wide powers to: -

- direct the conduct of the proceedings;
- truncate proceedings;
- direct the parties to prepare expert material at a time well before the allocation of a hearing date;
- make findings of fact other than at the final hearing;
- determine a matter arising from the proceedings; and
- make orders in relation to any specific issue at any stage in the proceedings⁸.

These provisions allow the judicial officer to tease out the issues and direct the parties' attention towards those issues that will most significantly impact on the best interests of the child.

Judicial officers who make findings of fact and make orders prior to the final hearing are not required to disqualify themselves from further hearing the matter on that basis alone (although it is suggested that an adverse finding of credit may be something that may give rise to an application for disqualification). Another significant shift away from the old adversarial process.

⁸ Section 69ZR & all its subsections.

In keeping with the view that cases should be managed by a consistent expert team, a judicial officer may, at any time, appoint a family consultant to be the family consultant in the proceedings.

Division 12A and Evidence.

The simplification of the Court process extends to the admission of evidence for matters being dealt with under division 12 A of the FLA. The Explanatory Memoranda states: -

“New Section 69ZT is one of the key provisions in achieving less adversarial court processes in child-related proceedings. It provides that the court must not apply the rule of evidence referred to in subsection 190(1) of the Evidence Act⁹ in child-related proceedings unless the court considers that the circumstances are exceptional and it has taken into account the factors set out in paragraph 69ZT(3)(b).”¹⁰(Emphasis and footnotes added).

Section 69ZT (1) declares that the following nominated provisions of the E A do **not apply** to child related proceedings; -

“(a) divisions 3, 4 & 5 of Part 2.1 other than sections 26, 30, 36 & 41;

(that is the General Rules about Giving Evidence; examination-in-chief; Re-examination & Cross Examination)

⁹ EA s.190(1) deals with the waiver of the rules of evidence & refers to Divisions 3,4 & 5 of Part 2.1; Part 2.2 & 2.3; Parts 3.2 to 3.8 of the EA.

¹⁰ Memoranda op cit at page 69.

(b) Part 2.2 and 2.3 (*documents, demonstrations, experiments and inspections*);

(c) Parts 3.2 to 3.8 (*rules that relate to hearsay, opinion, admission, evidence of judgments, etc.*)”

This section must be read with subsection 2 which says “**the court may give such weight (if any) as it thinks fit to evidence admitted as a consequence of a provision of the Evidence Act 1995 not apply because of this subsection.**”

(Emphasis added).

I cannot emphasise too strongly the impact of this subsection that seems to be sadly missed by many practitioners who are of the view that as long as the material is admitted into evidence it can be relied upon to support their case. The judicial officer may read the material but give it no weight! The best way to ensure that appropriate weight is given to the evidence is ensure compliance with the EA. even though strict compliance is not required to admit that evidence.

The Court also has discretion under subsection 3 of 69ZT in that the court may decide, notwithstanding the provisions of s69ZT (1) that it may apply a provision of a mentioned part or division of the Evidence Act provided that following are satisfied; -

- (a) the circumstances of the case are exceptional; and

- (b) the court has taken into account; -

(i) the importance of the evidence in the proceedings; and

(ii) the nature of the subject matter of the proceedings; and

(iii) the probative value of the evidence; and

- (iv) the powers of the court to adjourn the hearing, to make another order or to give a direction in relation to the evidence.

If a court exercises discretion and does apply a part or division of the E A, the court may give that evidence such weight as the judicial officer thinks fit. Consideration of the limited circumstances under which subsection 3 may be enlivened is discussed later in this paper.

To ensure that the principles in relation to the rules of evidence were not enlivened in any other way the FLA in s69ZT (5) makes it clear that the operation of subsection (1) does not revive the common law or state law which would otherwise have operated but for the provisions of the EA referred to in subsection (1)¹¹.

But what does it all mean?

It does not mean that the Evidence Act 1995 (Cth) is irrelevant and should otherwise be forgotten. Quite the contrary. You must be very much aware of the EA as those parts which are relaxed in relation to admissibility still affects the weight the court gives to evidence and **substantial parts of the EA are not excluded by the division and therefore play a significant role in the conduct and outcome of proceedings.**

So you can see just what provisions do and do not apply to child related proceedings I have attached tables at the end of the paper setting out what provisions are and are not excluded by s.69ZT (1). You will see significant parts of the EA still apply and you

¹¹ The EA effectively codifying the most of the common law rules of evidence.

should be aware of those provisions. I have not included each and every section that remains in force however I have summarised those which I think are particularly relevant to Family Law parenting proceedings and placed * against those sections which are in my view, very significant.

Be aware that evidence in affidavit are still subject to the requirements of form, and cannot contain conclusions, submission or argument.

Standard of Proof s.140 EA

The EA sets out the standard of proof in civil proceedings at s.140(1) being “*on the balance of probabilities*”. This standard is to be determined having regard to those factors set out in subparagraph 2 of the section, namely; -

(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.¹²

The gravity of the matters alleged is one of issues which Dixon J (as he then was), addressed in *Briginshaw v. Briginshaw*.¹³ When discussing the practical application of the standard of proof His Honour said:-

“[W]hen the law required the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found..... But

¹² EA s.140(2)

¹³ (1938) 60 CLR 336 at 361-362

reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal.”

To persuade the Court to the relevant standard of proof requires consideration of the quality of the evidence led in light of those matters set out in Brignishaw v. Briginshaw.

Similarly, s142 EA prescribes the standard of proof for the consideration of whether evidence is admissible or any other question arising under the EA. The standard of proof is again on the balance of probabilities and the Court is required to consider the importance of the evidence in the proceedings and the gravity of the matters alleged.

It is suggested that evidence should be thought about as being on a continuum relative to the issue for determination and the gravity of that issue. Evidence is rarely black or white but in varying shades of grey. Viewed this way it is easy to understand why careful consideration must be given to the weight evidence is to be given if it is admitted merely because of the provisions in s.69ZT (1).

The provisions of the EA relating to relevance are not affected by s69ZT (1) of the FLA therefore evidence must always be relevant and irrelevant material can be struck out.

What is relevant evidence?

Section 55 EA says; -

- (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 adduce evidence.*

As Stephen Odgers notes, “The key provision regarding the admissibility of evidence in Ch. 3 is s.56 whereby evidence that is “not relevant” is never admissible in a proceeding, while evidence that is “relevant” is admissible “except as otherwise provided by this Act”. It follows that the definition of “relevant evidence” is a matter of considerable importance.”¹⁴

¹⁴ Stephen Odgers, Uniform Evidence Law, Tenth Edition, Law Book Co. Thompson Reuters (Professional) Australia Limited, 2012 at page 203, [1.3.60]

Evidence which is not relevant is never admissible -but- not all relevant evidence is admissible!

The High Court in Smith v The Queen¹⁵ (2001) said: -

(if) “evidence is not relevant; no further question arises about its admissibility. Irrelevant evidence may not be received.”

All evidence must have **connection to the fact(s) in issue** before the Court. It must be capable of assisting the judicial officer to determine whether an alleged fact exists. There are many facts which are interesting but just not relevant to the issue to be determined, and in all cases those facts are not admitted into evidence.

Evidence which is relevant may not be admissible under the EA which largely codifies the common law position in relation to the rules of evidence¹⁶. As discussed many of the provisions of the EA that relate to the question of admissibility are excluded by s.69ZT (1).¹⁷

Judge Brewster proposed a five step approach to the question of the admission of evidence in the case of Cantrere & Wilton-Stote¹⁸ which provides an extension of the process generally followed under the EA¹⁹.

¹⁵ (2001) CLR 650

¹⁶ The Commonwealth Evidence Act only came into being in 1995. Prior to that each State had its own Evidence Act and otherwise the common law rules of evidence applied.

¹⁷ Not all provisions in relation to admissibility are excluded see particularly ss.135 & 136 which are general exclusions under EA.

¹⁸ [2015] FCCA 549 at 13

¹⁹ See table produced in Odgers. Op.cit at page 202

His Honour proposed; -

1. Ascertain whether the evidence in question is relevant (EA s.55)?
2. If the evidence is not relevant, then the evidence is not admitted; if, however the evidence is relevant then determine whether the evidence would be excluded by any provisions under the EA?
3. If the evidence would not be excluded it is admissible, if it would be excluded by one or more provisions of the EA, consider whether the provision(s) is one which has been excluded in child related proceedings by s.69ZT (1) FLA?
4. If the answer is yes, then determine whether the Court should exclude the provisions of FLA s.69ZT (1) under s.69T (3)?
5. If the answer is no, then consider whether the Court should exercise the discretion to exclude under other provisions of the EA?

It is suggested that the issue of the invoking of s.69ZT (3) of FLA will often arise early in the hearing and frequently will be determined as an interim or interlocutory issue prior to trial.

The significant question for the Court is, what weight if any, will be given to a particular piece of evidence which is **only** before the Court pursuant to s.69ZT (1)?

It's all a question of weight.

A consequence of s69Z (2) of the FLA is that evidence which is admitted may be given little or no weight by the court. If the evidence is given no weight then the effect would be that same as if it was not admitted at all, that is, it does not help your client's case!

Justice Coleman in Maluka & Maluka²⁰ when determining an application under s.69ZT (3) on the rehearing of the matter following an appeal concerning inter alia s.69ZT and its subsections, made the following comments on evidence admitted under s.69ZT (1) where the court may have to make finding as to domestic violence;

“As is not surprising, the High Court has made clear that serious findings such as sexual abuse and, by extension, domestic violence are not matters which can or should be lightly made. To proceed in reliance upon evidence which would not be admissible but for section 69ZT (1) is, in the Court's view, likely to be mischievous, and not just for one party.”²¹

Justice Murphy in the matter of Thornton & Thornton²² considered the weight to be given to reports and evidence given by a psychologist who saw the children in question, a further psychologist who met with the children and the parents and prepared a “Partial Family Report” and a “Brief Family Report” and a paediatrician who

²⁰ Maluka & Maluka [2012] FamCA 373

²¹ Maluka supra.at paragraph 28

²² [2015] FamCA92

met with the mother. The mother alleged that two female children had been sexually abused by their father.

At paragraphs 266 and 267 His Honour said; -

266 *“No application is made to have the relevant rules of evidence apply (s 69ZT (3)). As a result, the provisions of the Evidence Act 1995 (Cth) in respect of, relevantly, opinion evidence does not apply. Accordingly, opinions can be offered without relevant expertise for them being established. The admissibility of those opinions must be accepted.*

267 *Yet, even in the absence of an application pursuant to s 69ZT (3), when the issues are as serious as those relating to the sexual abuse of children, I am extremely uncomfortable about attaching weight to an opinion that abuse has (or has not) occurred in the absence of established expertise for that opinion. In assessing the weight of opinions about sexual abuse, the question of whether appropriate qualifications, training or experience permits a psychologist, or other expert witness, to give an opinion as to whether a child has been sexually abused or is at risk of same, must be a significant factor. (Indeed, the question of whether any qualifications, training or experience qualifies any person as an expert capable of giving opinions about that specific issue should not be assumed.²³”*

²³ See, for example, the discussion in Carpenter & Carpenter (2012) FamCA 1005, at [64] – [94]; Carpenter & Carpenter (2014) FamCA 100, at [38] – [42]

His Honour found that he could attribute no weight to evidence which purported to be that of “experts” who had proffered opinions regarding the likelihood of abuse occurring to the children.

In a different context Justice Le Poer Trench²⁴, after determining that pursuant to s.69ZT (3) the EA would apply to certain allegations made under the heading “Allegations made by the mother of sexual, physical and psychological abuse by the father, financial coercion and manipulation and emotional abuse” His Honour made comment on the drafting of the mother’s affidavit.

47. “Before considering the affidavit evidence of the mother under this heading, which commences at paragraph 17 of her affidavit, it is, unfortunately, necessary for me to comment on the drafting of the affidavit. It is further necessary to note that this affidavit was not prepared by an unrepresented litigant; it was prepared or settled by the mother’s solicitor, as specified at the conclusion of the affidavit. An example of this poor drafting is found in the very first paragraph under the subject heading. The paragraph details evidence to support the mother’s assertion of “financial coercion and manipulation”. It describes that the mother predominantly was not in employment during the course of the marriage. It describes that she did work for a period of approximately eight months assisting the father with a cleaning job during the course of the marriage. It describes that the father kept the income which had been earned by the mother and informing her that “it was his job to take care of the finances.” That paragraph concludes with the following sentence “I was not allowed to have anything to do with the money.” It is this concluding sentence

²⁴ Fagan 7 Fagan [2014] FamCA1108 paragraphs 45-47

that clearly the mother relies upon to establish that she was the victim of financial coercion and/or manipulation. It is clear that the sentence is a conclusion and to a trained legal eye, can clearly be understood not to be capable of given any meaningful weight by me.”

How do you ensure that the evidence you want to rely upon is given as much weight as possible?

Clearly if the evidence you rely upon would be admitted even if the excluded provisions of the EA applied then this is evidence which the court would give significant weight. It is important therefore that you are aware of the general principles in relation to evidence to ensure that you put the best possible evidence before the court.

In addition to the EA you must also be aware that when drafting affidavits, arguments, submissions and conclusions are not permitted. Arguments and submission are not evidence. In relation to conclusions, state the facts by which the court can draw the conclusion thereby ensuring the facts are admissible.

There is no substitute for re-reading the relevant parts of the EA. Until you are able to review the EA the following summary may be helpful. Those provisions of the EA which are not applied in Division 12A proceedings conducted pursuant to s.69ZT (1) of the FAL are marked with an asterisk * so that you can identify them.

Is it the best evidence?

As a very general guide the evidence must be the **best evidence** that can be given. A fact or event which the person giving evidence, has seen, heard or experienced themselves. The doctor who saw the patient is the best person to say how the patient presented; the neighbour who observed the accident is the best person to provide her observations not the person she spoke to her on the phone and told about the event. Likewise, evidence of the doctor who assessed the injuries is the best evidence while the summary given by a person who read the report by the doctor would be given little weight.

Evidence also needs to be **able to be tested**. An assertion of fact, for example that the car was blue; needs to be tested in cross examination. Therefore, the best evidence is from the person that made that observation as they can be questioned about what they saw so as to test the truth of the fact asserted.

The more significant the issue to be tried and the impact of that issue the more important it is to be able to test the evidence in the usual way by cross examination.

The **EA in Chapter 3 deals with the admissibility of evidence**. We have already considered that evidence must be relevant to the issues or facts in dispute to be admissible (Part 3.1, s55) however **not all relevant evidence is admissible**.

*Hearsay Evidence.

In EA Part 3.2 s.59 we find the rule against **hearsay evidence**. That is where a previous representation is relied upon to prove the existence of a fact asserted in the representation and the person who made the representation is not giving evidence.

For example, it is alleged by the mother that the father was physically abusive to the child Y on 25/1/2011 by hitting him in the face. The mother says that the lady across the road told her that she had seen the father hit Y in the face. The mother was not with the child at the time.

The Mother could not rely upon the conversation with the lady across the road as it would be a hearsay statement. (That is, a previous representation made by the lady across the road which the mother seeks to rely upon to prove that the father hit the child), unless it fell within one of the limited **exceptions to the hearsay rule** found in the EA. The best evidence of course would be the lady across the road who could give first hand evidence about what she saw and thereafter the veracity of that evidence could be tested by cross examination.

A representation may be what someone says orally but may also be in writing or in another visual form. Therefore if the lady across the road had written a letter setting out what she had seen of the incident between the Father and the child and sent that to the mother, that letter would be a hearsay statement (even if you annex it to an affidavit), unless one of the exceptions applied. That is the letter would not be admitted

to prove the fact that the father hit the child. It is only evidence of the fact that the lady across the road wrote a letter to the mother.

If the lady across the road had died prior to trial and appropriate notice had been given under the EA about the intention to use hearsay evidence about conversation (or the letter) then the evidence would be admissible however the weight it would be given would depend upon the other evidence in the matter (see ss 63 & 64 EA).

The FLA provides an exception to the **hearsay rule in relation to certain evidence given by children**. **Section 69ZV deals with the evidence of children**, specifically in s.69ZV (2). If the court applies the hearsay rule in Division 12A proceedings (under section 69ZT (3)) and the evidence of a representation made by a child about a matter relevant to the welfare of that child or another child would not normally be admissible under the hearsay rule, it is not to be precluded on that basis alone, but as always the weight a court will give such a statement will be a matter for argument. It should be noted that this provision applies in relation to any representation including an implied representation whether oral or in writing or implied by conduct of the child (s.69ZV (5)).

***Exceptions to the Hearsay Rule.**

Hearsay is about prior representations. Remember a representation can be made orally or in a visual/written form (e.g.: a document –which includes photographs, video, computer records etc.). There are the exceptions to the hearsay rule within the EA

these are in Part 3. Not all the exceptions are covered in this paper but those which commonly relate to family law proceedings are considered.

EA s.60 Hearsay evidence relevant for a non hearsay purpose.

In civil proceedings once such evidence is admitted it can also be used for a non hearsay purpose.

EA s.63 If the maker of the representation is not available (civil proceedings).

EA s.64 If the maker of the representation is available but it would cause undue expense or delay or would not be reasonably practical to call them to give evidence (civil proceedings).

Both sections 63 and 64 have notice provisions so that the other parties to the proceedings are aware of the intention to rely on such evidence (s.67). Other parties may object to the reliance upon such evidence (s.68).

EA s.66 A Contemporaneous statements about a person's health, state of mind etc.

EA s.69 Business records.

This is perhaps the most misunderstood exception to the hearsay rule. To understand the exception, you must first consider "what is a document?" The definition of "document" is found in the dictionary to the EA. The definition is very wide. Similarly, you must consider "what is a business" under the provisions of the EA.

Not every document that is produced under subpoena by a business will fall into the category of business record. The record must be kept by the business for the purpose of running the business or in the course of running the business and the representation in the document was made by a person who had (or might reasonably be supposed to have had) personal knowledge of the fact asserted. The documents will not be admitted however if it was made in the contemplation of litigation or in connection with an investigation relating or leading to criminal proceedings.

The maker of the representation will still need to be called to prove the truth of the contents of the document where that fact is in issue so that the evidence may be tested.

EA s.73 Evidence of reputation as to relationships and age.

This rule allows hearsay evidence to be admitted that relates to marital status, age and family relationships.

EA s75. Hearsay rule does not apply to interlocutory proceedings provided that the source of the hearsay representation is stated.

An interlocutory proceeding has been held to be a proceeding which is not final and usually deals with procedural matters²⁵ although this is not without controversy It is suggested that most interim hearing would fall into this category (if they were not otherwise caught by s.69ZT (1) of the FLA).

²⁵ Per Windeyer J in Hall v Nominal Defendant (1966) 117 CLR423 at 444

***Opinion Evidence.**

Opinion evidence is inadmissible under Part 3.3 of the EA unless it is something that the witness has the requisite expertise to give evidence about, as an expert witness. For example, a witness cannot say “the father acted recklessly”. This evidence offers an opinion about the father’s conduct or/or draws a conclusion. Such evidence is inadmissible. The witness could however give evidence about facts that the witness personally observed that would allow the court to draw that conclusion.

It is very common in family law affidavits to read a statement that is opinion or conclusion evidence which the witness is not qualified to give. For example

“the husband has serious mental issues”

“the husband is anxious and paranoid”

A witness who is not an expert psychiatrist cannot make such a statement of opinion and hope that it will be admissible. That witness could however set out the facts from which an expert might draw such a conclusion. For example: -

“I observed the husband on X date, he went into the lounge room and searched under the table and looked under each chair and in the light fitting. I said to the Husband “what are you doing” he said to me “I am looking for bugging devices; people are following me and listening to my conversations”.

Similarly stating the conclusion “*the husband is a very violent man*” would fall foul of the EA however stating the facts by which the Court could draw that conclusion is

likely to be admissible and be given weight. For example, the particulars of incidents of violence fixed in place and time and specifying the acts that took place and the frequency of such specific acts would allow the Court to draw the appropriate conclusion.

Sentences that start with the words “I thought”, “I believe” or “It is my view” are warning bells that what follows will more likely than not be a statement that is not relevant or if relevant to the issue in dispute an opinion given by the maker of the statement and therefore not admissible unless the opinion is an expert opinion which must then comply with the provisions of the EA that deal with experts.

The definition of what constitutes an **opinion is “an inference drawn or to be drawn from observed and communicable data”**²⁶ The distinction between what is an opinion and what is a fact is sometimes not as clear as you might think. This is particularly so in relation to identification evidence.²⁷

There are some limited exceptions to the opinion evidence rule. The first relate to evidence of an opinion where that evidence is relevant for a purpose other than to prove the truth of the fact about which the opinion was expressed (EA s.77). The second exception relates to certain lay opinions which are admissible if *“the opinion is based on what the person saw, heard or otherwise perceived about a matter or event; and the evidence of the opinion is necessary to obtain an adequate account or understanding of the person’s perception of the matter or event.”* (EA s 78)

²⁶ Allstate Life Insurance co. v ANZ Banking Corp Ltd (No 5) (1996) 64 FCR 73 at 75

²⁷ R v Leung and Wong (1999) 47 NSWLR 405 at 43 and Kirby J in Smith v The Queen (2001) 75 ALJR 1398 at 52.

Expert Evidence.

The EA creates an exception for opinion evidence which is wholly or substantially based on the opinion maker's specialised knowledge which in turn is based on the maker's training, study or experience (section 79). I do not intend to deal with expert evidence in any detail in this paper.

***Exceptions to the Hearsay & Opinion Rules
Admissions.**

Section 81 of the EA creates a further exception to the hearsay and opinion rules in relation to evidence of an admission or a previous representation made in relation to an admission at the time the admission was made and to which it is reasonably necessary to refer so that the admission is understood.

This is limited to first hand hearsay (EA s.82) or admissions made by third parties (EA s.83). It does not include admissions influenced by violence or the threat of conduct of that kind (EA s.84) or admissions made where the maker did not have authority to make the admissions (EA s.85).

***Evidence of judgments and convictions.**

EA s91 renders inadmissible evidence of decisions or findings of fact in proceedings to prove the existence of a fact that was in issue in that proceeding. A judgment can of course be tendered to establish the terms of the judgment but not the truth of the facts

found in that case. The exception to this rule relates to letters of probate or administration used to prove the date of death of a person or the execution of a testamentary document (EA s.92 (1)), or in civil proceedings the conviction of an offense (EAs.92 (2)).

You should note that **FLA s69ZX (3) gives the court discretion to admit into evidence the transcript of evidence of any other proceedings and to adopt any findings decision or judgment in those proceedings.**

*Tendency and coincidence.

Part 3.6 of the EA deal with the issues of tendency and coincidence however the rules in the part do not apply to evidence of the credibility of a witness, and: -

s.94 (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.

Thus evidence that is given to prove that a person has a tendency to act in a certain way is only admissible if such evidence is of “significant probative value” and the requisite notice is given²⁸ of the intention to use such evidence.

Tendency and coincidence evidence cannot be admitted for another purpose (EA s.95).

²⁸ S.97 (1) & (2) EA

Evidence of “character, reputation or conduct” (tendency) cannot be used in civil proceedings to prove that a witness acts in a particular way unless the requirements of EA s.97 are met, namely that the requisite notice has been given and the court is of the view that the evidence will have significant probative value.

“Probative value” is defined in the EA dictionary as *“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”*.

Significant is not defined in the dictionary. Odgers suggests: -

“It has been held to mean something more than mere relevance but something less than a “substantial” degree of relevance.”²⁹

A similar rule applies in relation to “coincidence”. (EA s.98)

(A court may dispense with the requirement for notice under EA s.100).

***Credibility evidence.**

The definition of what is credibility evidence is set out in EA s.101A and s.102 sets out the general rule that credibility evidence about a witness is not admissible unless one of the exceptions to the rule are met. Those exceptions include evidence adduced in cross-examination EA ss.103-104); evidence in the rebuttal of denials (EA s.106); evidence to re-establish credibility (EA s.108); evidence of persons with specialised knowledge (EA s.108C) and character of the accused person (EA s.110).

²⁹ Odgers, S. Uniform Evidence Law 10th Edition Thomson Reuters (Professional) Australia Limited (2012) pages 456 -457

***Character Evidence.**

Part 3.8 of the EA deals with character evidence in the context of criminal proceedings.

EA Provisions that apply in all cases.

Provisions about Privilege. EA Part 3.10.

Legal Professional Privilege.

This division of the EA creates a privilege for certain documents and communications made by a lawyer for whom the dominant purpose was to provide legal advice or legal services (EA ss.117-119). This privilege is not absolute and can be lost in certain circumstances (EA ss121-122).

It is important to note that privilege can be claimed by self represented litigants in relation to confidential communications and documents between the litigant and another person for the dominant purpose of preparing for or conducting the litigation (EA s.120).

Other areas of privilege under the EA that are not affected by Division 12A are Religious confessional privilege (EA s.127) and privilege against self-incrimination in other proceedings (EA s.128).

Certificates under s.128.

The use of a certificate pursuant to s.128 of EA is something with which you should be familiar. There are many circumstances in family law proceedings where a certificate may be required particularly in relation to social security fraud, drug use and tax evasion. If your client is likely to self incriminate in his/her affidavit speak to counsel about how you might avoid this and still make provision for the giving of relevant evidence. For example, your client might say, *“I have evidence that I wish to provide to the court regarding my ability to meet expenses following the conclusion of the relationship however to do so may incriminate me. I am willing to provide this evidence to the Court if I am given a certificate under section 128 of the Evidence Act 1995 (Cth).”*

You should be aware of the limitations of such a certificate as it only goes to the protection against self-incrimination by not permitting evidence given under the certificate to be used in other proceedings

Settlement negotiations, s.131.

Evidence of settlement negotiations cannot be adduced in evidence and are therefore inadmissible (EA **s.131**) except where there is consent express or implied; or what you are seeking is the enforcement of the agreement; or the court would otherwise be misled by evidence already before the tribunal; or the negotiations were part of the commission of a fraud or offence or as an abuse of power (s.131).

Letters of negotiation whether or not they are titled “without prejudice” would fall into this category or statements by a party in an affidavit about the terms of an offer to resolve the proceedings.

This provision does not however exclude the terms of a signed agreement reached between parties but then not followed.

General discretion to exclude or limit the use of evidence (EA ss135 & 136).

These provisions are of wide impact and are important to remember.

S.135 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.*

S.136 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.”*

These provisions reflect the concept of “fairness” in the admission of evidence.

Probative value is defined in the EA to mean “*the extent to which evidence could rationally affect the assessment of the probability of the existence of a fact in issue*”.

Emotive evidence, particularly if the maker cannot be cross examined may fall within this category (that is evidence which is hearsay but is admitted for some other reason such as the provisions of Division 12 A). Each situation will turn on its own facts and the purpose for which the evidence is to be used.

Similarly, evidence which is obtained in contravention of an Australian law may be excluded (s.138).

EA Chapter 4. part 4.1 –Standards of Proof.

This chapter deals with the issues of proof. The **civil standard of proof** is found in EA **s.140 (1)**, being on “the balance of probabilities”. This subsection must however be read in conjunction with EA s.140(2) which provides for the discretion of the court to take into account the cause of action/defence and the nature of the subject matter and the gravity of the matters alleged.

You should refer to the previous discussion on Standard of Proof and s.140 earlier in this paper.

EA Chapter 4, part 4.2-Judicial Notice: part 4.3-Facilitation of Proof; part 4.4- Ancillary provisions.

Judicial Notice and Matters of Common Knowledge.

This part permits judicial officers to take Judicial Notice of: -

- the Law, being Acts, State and Federal; Ordinances of a Territory; regulations and rules; proclamations and instruments of a legislative character; and
- matters of common knowledge.

In McGregor & McGregor³⁰ the Full Court considered the use of certain academic psychological material under section 144 of the EA which provides; -

- (1) Proof is not required about knowledge that is not reasonably open to question and is:
 - a. Common knowledge in the locality in which the proceedings is being held or generally: or
 - b. Capable of verification by reference to a documents the authority of which cannot be reasonably questioned.
- (2) The judge may acquire knowledge of that kind in any way the judge thinks fit.
- (3) The court (including, if there is a jury, the jury) is to take knowledge of that kind into account.
- (4) The judge is to give a party such opportunity to make submissions, and to refer to relevant information, relating to the acquiring or taking into account of knowledge of that kind as is necessary to ensure that the party is not unfairly prejudiced.

After considering the comments made by the Australian Law Reform Commission in relation to the section the Full Court noted, *'the information to which the section refers is of a kind not reasonably open to question and is capable of verification from authoritative sources..... In practice there would be few issues in respect of which reference to extrinsic materials would not be "reasonably open to question". This we*

³⁰ (2012) FLC 93-507 Full Court of Bryant CJ, Faulks, DCJ & Ainslie-Wallace J

*think would be particularly so in relation to social science issues in parenting proceedings.*³¹

Significantly the need to provide procedural fairness (or natural justice) is preserved by the section as an overriding requirement which in this case was not met in any event.

Facilitation of Proof.

EA Part 4.3 sets out certain rebuttable presumptions in relation to proof of documents or things produced by machines, devices or other processes; Commonwealth records; official records; public documents; receipt dates of items sent by post, presumptions in relation to the sending and receipt of electronic communications and telegrams; receipt of documents sent by Commonwealth agencies; presumptions in relation to the attestation of documents and authenticity of documents produced under seal.

Ancillary provisions.

Division 1 of this part provides a procedure to parties to request the maker of a representation in a document such as a business record, to be called to be cross examined. Failure to call the maker of the representation may mean that the representation in that document is given no weight.³²

Division 2 permits certain Commonwealth records to be admissible by affidavit.

Division 3 provides the manner in which evidence foreign law may be adduced.

Division 4 provides the mechanism for: -

³¹ See paragraphs 64 to 69

³² Odgers, op cit at pages 973 to 982.

- (a) expert evidence to adduced without the expert attending however this must be read subject to the provisions of the Family Law Act 1975 and the Federal Circuit Court of Australia Act 1999 and the respective rules of court;
- (b) evidence of convictions and judicial proceedings.

Discretion to apply the otherwise non applicable provisions of the EA.

s.69ZT (3)

Section.69ZT (1) of the FLA is the “usual” situation.

As the Full Court said in Maluka & Maluka: -³³

“Section 69ZT has changed the law in relation to aspects of evidence in child related proceedings. Rather than this evidence only being admitted in exceptional circumstances, in child related proceedings evidence of this type will now only be excluded in exceptional circumstances in accordance with s69ZT (3) of the Act.”

There are however circumstances in which the court may decide that it is appropriate for one or more of the provisions of the EA to apply to **an issue** in the proceedings (or all issues in the proceedings).

³³ (2011) FLC 93-464 per Bryant CJ, Finn & Ryan JJ at paragraph 127

Section 69ZT (3) requires the court to: -

- (a) be “*satisfied that the circumstances are exceptional*”; **and**
- (b) take “*into account (in addition to any other matters the court thinks relevant)*”:
 - (i) *the importance of the evidence in the proceedings; and*
 - (ii) *the nature of the subject matter of the proceedings; and*
 - (iii) *the probative value of the evidence; and*
 - (iv) *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.”*

(Emphasis added).

Thereafter the court may give whatever weight as the court thinks fit, to such evidence (FLA s69ZT (4)).

The Full Court’s consideration of FLA s.69ZT (3).

The Full Court of the Family Court considered s.69ZT (3) in *Khalil & Tahir-Ahmadi*³⁴

This was an appeal from a decision of Dawe J. The case was an international relocation case where both parents had alleged significant family violence by the other occurring both in Australia and in Iran, the parent’s country of origin.

³⁴ [2012] FamCAFC 68 per Coleman, May & Ainslie-Wallace JJ

The case had a complex legal history with orders being made in the Federal Magistrates' Court (as it then was) for the father to have sole parental responsibility for the child and for the child to live with the father in Iran; (the father had, without the knowledge or participation of the mother, obtained a custody order in his favour from an Iranian court). The mother sought a stay in relation to the original decision and interim orders were made for the child to live with the father in Australia and spend time with the mother pending the appeal decision. The Full Court allowed the appeal and remitted the matter for re-hearing. The proceedings were transferred to the Family Court and heard by Dawe J in an 18-day trial in which the mother was successful in her application to have the child live with her and remain in Australia.

As part of the mother's case, the mother wished to rely upon documents and medical opinions containing hearsay evidence about the family violence, (some of these documents being created in Iran). Both the father and the independent children's lawyer contended that this was a matter in which s.69ZT (3) of the FLA should apply.

Dawe J rejected that argument finding that the circumstances of this case were not "exceptional" and that the provisions of s.69ZT (1) should apply.

20. *"This is not a case where I am being asked to make a positive finding of sexual abuse. It is a case which has some unusual features relating to the immigration and foreign law issues. But the significant factors to be determined relate to issues concerning family violence and allegations in relation to parenting capacities of each of the parents, and the possible psychological harm from inappropriate parental influence. Issues such as family violence and capacity of parents to provide a proper upbringing for the child and the attitude to the relationship with another parent are not issues which are unusual or exceptional in Family Court of Australia proceedings."*

22. I am not satisfied that the circumstances surrounding these issues are exceptional. It is clear that in this Court, the Family Court of Australia, the cases which come before the Court are now very regularly cases involving allegations of family violence, psychological harm and inability or unwillingness to encourage a relationship between the child and the other parent.

23. The Court therefore is unable to say that the unusual features of the case, so far as they relate to issues of immigration or foreign law, are sufficient to bring into effect the provisions of section 69ZT (3). Therefore, I am not satisfied that the circumstances are exceptional.”³⁵

Dawe J’s decision was challenged on appeal.

The Full Court considered the meaning of “exceptional circumstances” for the purposes of s.69ZT (3). The phrase “exceptional circumstances” is commonly used in the criminal courts and is therefore discussed in many criminal cases. The Full Court referred to Dawe J’s use of the definition of “exceptional” as applied by Callinan J in *Baker V the Queen*³⁶ which referred to and approved the statement by Lord Bingham of Cornhill CJ in *R v Kelly*³⁷ who said: -

“We must construe the word “exceptional” as an ordinary familiar English adjective and not as a term of Art. It describes a circumstance which is such as to form an exception which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional, a circumstance need not be unique or unprecedented, or very rare, but cannot be one that is regularly, or routinely, or normally encountered.”

³⁵ Khalil & Tahir-Ahmadi supra at paragraph 53

³⁶ [2004] 223 CLR 513 at 173

³⁷ [2000] QB 198 at 208

In *Khalil* the Court did not interfere with Dawe J's decision not to invoke s.69ZT (3) but did however make the following comments in relation to the use and weight of such evidence.

*"[I]t would have been preferable for Her Honour to have clearly indicated the use to which the contentious evidence could be put, the difficulty we see with the order she made is that it left the parties in a position of uncertainty as to how she would treat the evidence to which objections had been raised.....there is no substance to the appeal , it would have been preferable for her Honour to have clearly indicated the use to which the contentious evidence would be put and the weight, if any she proposed to attach to it."*³⁸

The analysis of the Full Court in *Khalil* includes a review of significant prior decisions on s.69ZT (3) in particular the discretionary nature of the subsection.

In *Maluka & Maluka*,³⁹ Coleman J, sitting as a single judge re-hearing a case which had initially been heard by Benjamin J came to a different conclusion about the whether s.69ZT (3) should be invoked.

Benjamin J found although the risk of family violence in the case was grave the circumstances were not exceptional for the purposes of s.69ZT (3). The Full Court found no error with the manner in which Benjamin J had decided that particular issue; however, the decision was overturned on other grounds and remitted for hearing before Coleman, J.

Coleman J, made the following comments in relation to evidence which would only be admissible pursuant to s.69ZT (3)

³⁸ *Khalil & Tahir-Ahmadi* supra at 56

³⁹ [2012] Fam CA 373

“Perhaps for present purposes the short and simple answer is that particularly in the context of determining disputed issues of fact or belief with respect to domestic or family violence or apprehension thereof it would appear unsafe to afford inadmissible evidence any significant weight in the exercise of the Court’s fact-finding functions.”⁴⁰

“As noted earlier, this aspect of the matter is not a one-way street. It might superficially be thought that to apply section 69ZT (3) would, to use the colloquial, raise the bar in terms of the onus which the mother bears. As suggested earlier, however, that is not entirely accurate and there is, in the Court’s view, an inherent danger in relying upon evidence which would be inadmissible, but for section 69ZT (1), that the mother may well be placed in a position where she has the benefit of findings of fact which are not sustainable on appeal. It could be asked rhetorically; what mischief would be likely to arise from the application of the rules of evidence? None has been suggested. That is unsurprising, as the provisions of the Evidence Act facilitate rather than impede the receipt of evidence probative of facts or issues in dispute, and guard against the receipt of “evidence” which could not safely or fairly do so.”⁴¹

In Amador & Amador⁴² a differently comprised Full Court (Coleman, May & Le Poer Trench JJ) had said in relation to documentary evidence admitted under s69ZT(1) *“It seems to us to follow from the provisions of s.69ZT(1) and 69ZT(2) that if a document is admitted to evidence which would otherwise not have been admitted, had all of the parts and divisions of the Evidence Act 1995 (Cth)(“the Evidence Act”) been applicable*

⁴⁰ Ibid Paragraph 37.

⁴¹ Ibid paragraph 38

⁴² (2009) 43 Fam LR 268 at 66

to the case, it is incumbent on the trial judge to specify what weight, if any, has been given to the subject document and why.”

It is suggested that in line with the principles of fairness and transparency where controversial evidence is to be relied upon the judicial officer needs to identify the use to which the evidence has been put and the weight that has been attributed to it.

FLA s.69ZW
Evidence relating to child abuse or family violence.

Section 69ZW of the FLA allows the Court to make an order to obtain information from prescribed State or Territory authorities in relation to issues of family violence and child abuse. The prescribed authorities are set out in the Family Law Act Regulations in regulation 12CD (which then refers to Schedule 9 of the Regulations).

Section 69ZW (5) of the FLA requires the Court to admit into evidence those documents or information received from the relevant authorities if the court intends to rely upon those documents or information.

The section also deals with the issues of ‘notifiers’ and information that might identify the notifier and the very limited circumstances that the identification information can be released.

EA s69ZX
Court's general duties & powers relating to evidence.

In keeping with the principles of strict case management this section provides the court with wide powers to direct how and what evidence that will be given including limiting time for oral argument, limiting time for the giving of evidence; when evidence might be given orally, limiting the numbers of witnesses and directing what evidence may not be given by witnesses.

The court is specifically given power to:-

- admit into evidence transcripts from other proceedings; and
- draw conclusions from that transcript; and
- adopt any recommendations or findings, decisions or judgments of another court, tribunal or those of the current court, in the other proceedings.

This section may be significant where proceedings for criminal matters have taken place that are relevant to the facts in issue before the court dealing with the child related matter.

Finally, in FLA s.69ZX (4) limits the use of EA s.126(H) which relates to the protection of journalists' sources. Under the FLA the court may permit evidence that identifies a journalists' source if the court considers that the same would be in the best interests of the child for that information to be disclosed.

**FLA Division 12 A
Watch this Space.**

Although division 12 A was aimed at providing a framework within which parenting cases could be dealt with in a more child and user friendly environment, the overarching requirement that the court act in the best interests of the child means that where there are complex factual issues particularly those involving violence and abuse, the court will be required to conduct the factual enquiry with rules that provide fair and predictable outcomes.

Do not forget the important role the EA plays in ensuring those fair and predictable outcomes. When drafting affidavits and gathering evidence to support your client's case do not undertake this task without considering the likely weight the evidence will be given having regard to the provisions of the EA.

Provisions of EA excluded by s.69ZT(1) FLA

Provision of EA	Summary
Part 2.1	Adducing Evidence from Witnesses
Divisions 3 - 5	General rules about giving evidence are excluded <i>Except s.26 courts control over the order of witnesses which includes the order of appearance and questioning;</i>
	<i>Except s.30 giving evidence via interpreters;</i>
	<i>Except s.36 power of the Court to order a person to give evidence and or produce documents without the issue of a subpoena;</i>
	<i>Except s.41 power to disallow improper questions;</i>
	Provisions about leading questions, revival of memory, unfavourable (formerly hostile) witnesses, limits on re-examination, prior inconsistent statements and leave to recall witnesses are excluded by s.69ZT (1) however these are matters for which the judicial officer would otherwise still retain discretion in respect of given the principles of the division.
Part 2.2	Documents
	Provisions which relate to the proving of the contents of certain documents including documents from foreign countries, the proof of voluminous and/or complex documents by way of summary, and the abolition of the original document rule for the purposes of admission into evidence do not apply for the admission of evidence under the section.
Part 2.3	Other Evidence
	Provisions relating to the giving of evidence by means other than by way of witnesses or documents (for example by way of view or demonstration) do not apply for the admission of evidence under the section.
Part 3	Admission of Evidence
Part 3.2	Provisions in relation to the exclusion of hearsay evidence do not apply.
Part 3.3	Provisions in relation to the exclusion of opinion evidence do not apply.
Part 3.4	Provisions in relation "admissions" do not apply.
Part 3.5	Provisions in relation to the exclusion of judgments, decisions and convictions do not apply.
Part 3.6	Provision about the use of tendency and coincidence do not apply.
Part 3.7	Provisions in relation to the admission of credibility evidence do not apply.
Part 3.8	Provisions in relation to the admission of character evidence do not apply.

Provision of EA not excluded by s.69ZT (1)

Note that every section which is not excluded is not specifically referred to however those sections with particular relevance to Family Law proceedings is referred to by section number.

Provision of EA	Part	Summary
Chapter 1	All	Formalities, definitions, application of the EA , extended application of the EA; binding the Crown; operation of other Acts, effect of the EA on other Acts, preservation of parliamentary privilege & general powers of a court.
Chapter 2	Part	Adducing Evidence
Part 2.1-Div 1	All	Competence & Compellability of Witnesses
Division 2	All	Oaths and Affirmations
Division 3	Part	General Rules about giving evidence
s.26		The Court's control over the questioning of witnesses.
s.30		The Court's power to order a person to give evidence and /or produce documents without the issuing of a subpoena.
s.36		The giving of evidence via an interpreter.
Division 5	Part	Cross examination
s.41		Disallowing improper questioning of a witness.
Chapter 3	Part	Admissibility of Evidence
Part 3.1	All *	Relevance- inclusionary provisions
Part 3.9	All	Identification in Criminal proceedings (not relevant)
Part 3.10	All	Privilege provisions and protections.
	*	Client legal privilege (ss 121-126)
	*	Privilege in respect of self-incrimination, s.128
		Evidence excluded in the public interest s.129
	*	Evidence of settlement negotiations s.131
Part 3.11	All	Discretionary & mandatory exclusions
	*	General discretion to exclude evidence which is; - unfairly prejudicial or misleading/confusing or results in an undue waste of time s.135
	*	General discretion to limit the use of evidence which is; - unfairly prejudicial or misleading/confusing or results in an undue waste of time s.136
	*	Limited discretion to admit evidence that was improperly or illegally obtained s.138
Chapter 4	All	Proof
Part 4.1	All	Standards of Proof
	*	Standard of proof in civil proceedings- being on the balance of probabilities s.140
	*	Standard of proof for the admissibility of evidence is on the balance of probabilities and court must take into account the importance of the evidence in the proceedings and the

		gravity of the matters alleged s.142
Part 4.2	All	Judicial Notice
		Matters of Law Proof is not required about the provisions or the coming into effect of laws of the Commonwealth, rule and regulations etc. s.143
		Proof is not required about matters of “common knowledge” s.144
Part 4.3	All	Facilitation of Proof
		Presumptions in relation to documents produced by machines & other devices Ss.145,146
		Presumptions in relation to documents sworn, attested or to which signatures have been affixed by certain people, official documents Ss 148-159
	*	Deemed evidence of the date of receipt and recipient of prepaid postal communications s.160
	*	Evidence of electronic communications and deemed of dates of receipt and recipient s.161
	*	Proof of letters sent by Commonwealth agencies and date of receipt and recipient s.163
Part 4.4	All	Ancillary provisions
Division 1	All	Requests to produce documents or call witnesses
	*	Formal requirements to request documents be produced and or witnesses called including the time limits and the implications of failure to comply Ss.166-169
Division 2	All	Proof of certain matters by affidavit or written statement
		Provisions for certain people as nominated in s.171 of the EA to provide evidence of a fact.
Division 3	All	Evidence of foreign law, foreign law reports etc.
Division 4	All	Procedures for proving other matters
		Certificates of expert evidence s.177
		Evidence of convictions, acquittals & other judicial proceedings given by a certificate signed by judge, magistrate, registrar or proper officer s.178
		Proof of service of statutory notifications, notices, orders and directions s.181
Chapter 5	All	Miscellaneous
		Inferences
		Court may examine a document (or thing) to determine the application of provisions of the EA and to draw any reasonable inferences from that document or thing that may be appropriately drawn. s.183
		Before whom affidavits may be sworn in Commonwealth proceedings s.186
		The use a voir dire to determine preliminary questions

		(including issues of admissibility) s.189
	*	Court can waiver the provisions of EA contained in Division3,4 or 5 of Part 2.1 or Part 2.2 or 2.3; or Parts 3.2 to 3.8 with the consent of the parties noting that child related proceedings under the FLA have own specific provisions in relation to evidence in s.69ZM- s.190
	*	Agreement as to facts and implications of the same for hearings and evidence to be adduced s.191
	*	Additional powers of a court in relation to discovery or inspection of documents and ordering the disclosure of documents and reports s.193

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Foley's List