SOME KEY CONCEPTS IN THE *EVIDENCE ACT* 2008 FOR CIVIL PRACTITIONERS

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Some key concepts in the *Evidence Act* 2008 for civil practitioners

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General structure of the Act

1. With the introduction of the Evidence Act 2008 (**the Act**), for the first time the differences in the rules of evidence relating to criminal and civil proceedings were clearly delineated (the previous practical differences being swept up in interpretation and application rather than the rules themselves).

2. Nevertheless, the majority of sections apply to both criminal and civil proceedings with some additional protections for criminal proceedings (for example, the general discretions to limit or exclude evidence in sections 135, 136 and 138 apply to civil and criminal and section 137 provides an additional right to exclude prejudicial material in criminal proceedings).

3. The Act was intended to unify the laws of evidence across the states, and substantially change the rules of evidence[1], although many of the sections reflect common law rules[2]. It does not, however, effect any common law rule except as provided by the Act. There is still some significant uncertainty regarding the status of some common law rules[3]. In addition to the common law, other evidentiary provisions still have a role to play including the *Civil Procedure Act* 2010[4], the *Criminal Procedure Act* 2009 and the *Evidence (Miscellaneous Provisions) Act* 1958.

4. The major differences between the rules of evidence applicable to civil and criminal proceedings are the hearsay provisions which have different exclusions (civil proceedings – sections 63 and 64, criminal proceedings – 65 and 66) to the general rule against hearsay contained in section 59. Also, parts 3.8 and 3.9 of the Act which relate to character evidence and identification evidence only apply to criminal proceedings. Other sections such as part 3.6 covering tendency and coincidence are expressed as attaching to both criminal and civil procedures, but are used almost exclusively in the criminal law context.

5. The Act itself sets out a useful flow chart regarding admissibility of evidence at the start of chapter 3 of the Act. When arguing the admissibility of evidence the onus of demonstrating the conditions of admissibility of evidence under the Act lies on the tendering party[5]. Those conditions will include relevance, any exclusions (such as

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[1] See discussion in *Papakosmas v R* (1999) 196 CLR 297; (1999) 164 ALR 548; (1999) 73 ALJR 1274; (1999) 15 Leg Rep C16; [1999] HCA 37, notably at [90] – [97].
[2] For example, the discretions to exclude evidence – see discussion in *Haddara v R* [2014] VSCA 100 at [3] – [4].
[3] See for example, *Haddara v R* [2014] VSCA 100 where Weinberg and Redlich J ruled that the courts retain a discretion to exclude evidence over and above those discretions contained in Part 3.11 of the Act
[4] For instance section 56(2) which allows a court to limit the use of documents or take certain facts as proved
[5] *Lithgow City Council v Jackson* (2011) 244 CLR 352; 281 ALR 223; [2011] HCA 36 at [17] (per French CJ, Heydon and Bell JJ);

hearsay) and whether the discretion to exclude the evidence should be exercised by the judge.

Competence

6. Division 1 of part 2.1 of the Act replaces the common law rules regarding competence of witnesses.

7. Pursuant to s.12 presumption that every person is competent to give evidence and may be compelled to do so, this includes children. The onus is on the party alleging lack of competence to prove that a witness is not competent.

8. However, a party may give unsworn evidence in circumstances where they are not competent to give sworn evidence pursuant to s.13(5). However, the party seeking to call the unsworn evidence must apply to the Court for this purpose and the Court may inform itself as it sees fit[6] including opinion evidence from experts such as doctors. The parties do not get to cross examine a witness in the context of determining competency[7].

Relevance

9. The preliminary question in the assessment of any evidence is the question of relevance pursuant to section 55. The test of whether something is relevant is set out in section 55(1) as evidence which "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".

10. When discussing relevance, it has been said that a useful practical test of its relevance is to ask what the trial judge could or should have said to the jury as to the use they could make [of the evidence] in their deliberations[8].

11. In *Washer*[9] the context of a criminal proceeding, the High Court has described relevance in the following manner[10]:

> *Relevance depends upon whether the evidence could rationally affect, directly or indirectly, the assessment of the probability of the existence of a fact in issue in the proceedings. That can be determined only by an analysis of the*

[6] S.13(8)
[7] *RJ v R* (2010) NSWCC 263
[8] *Washer v Western Australia* (2007) 234 CLR 492; 239 ALR 610; [2007] HCA 48 at [4] (per Gleeson CJ, Heydon and Crennan JJ.)
[9] Ibid
[10] Ibid at [5]

> *facts in issue in the proceedings, and the circumstances which bear upon the question of probability. It also requires consideration of the process of reasoning by which information as to the fact of the acquittal could rationally affect the assessment of the probabilities. The word "rationally" is significant in this context. In order to establish relevance, it is necessary to point to a process of reasoning by which the information in question could affect the jury's assessment of the probability of the existence of a fact in issue at the trial.*

12. A "fact in issue" generally relates to an element of the relevant cause of action (or of the offence in criminal law). However, the evidence does not have to directly prove an element of the cause of action to be relevant. Whilst relevant evidence can be directly relevant to a fact in issue, circumstantial or strengthening evidence is also relevant if it tends to support one case theory over another.

13. In a trial context, relevance is rarely considered in isolation. The common law rules regarding relevance of evidence included concepts such as "legal relevance" which required some threshold higher than minimal relevance[11]. Whilst no such limitations on "relevance" exist beyond the test of rationality referred to in *Washer,* the question of limited relevance is dealt with by section 135 which empowers a court to exclude evidence where the probative value of the evidence is substantially outweighed by its prejudicial value, confusing nature or any waste of time. In criminal proceedings there is the additional protection of section 137 which only requires the danger of prejudice outweigh (rather than substantially outweigh) the probative value of the evidence.

Hearsay

14. Section 59 provides "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". In essence, this provision reflects the common law rule against hearsay. That is, evidence of the fact that someone said (represented) something is not evidence of the truth of that statement. The rule applies not only to oral statements, but to written statements and to implied statements when relied upon to prove the "fact that it can reasonably be supposed that the person intended to assert by the representation".

Exception to the hearsay rule – maker available

Undue delay/expense

[11] See discussion at 4.1.3 of Gans and Palmer, *Uniform Evidence*, first edition

15. If the person who made the representation is available, then evidence can be led from a witness regarding the representation if witness saw, heard or otherwise perceived the representation being made[12] or a document containing the representation[13] if it would cause undue expense or undue delay to call the person. This section is subject to notice requirements set out in section 67(1). Within 21 days of such a notice, the other party may object to the reliance on section 64(2) and a preliminary hearing may be heard on the matter. If the objection is found to be unreasonable the objecting party may be ordered to pay the costs in relation to the objection.

Witness being called

16. Evidence of a representation may be given by a person who made a representation or a person who heard/saw the representation if the maker of the representation is being called to give evidence[14]. Where the representation is contained in a document, the document cannot be tendered until the conclusion of the examination in chief of the maker of the representation[15].

Exception to the hearsay rule – witness unavailable

17. Where a witness who made the representation is 'unavailable', evidence of the prior representation can be called if it is contained in a document[16] or by a person who otherwise heard/saw the representation being made.

18. Definition of 'unavailable'[17] includes if the witness is dead, not competent to give evidence, if all reasonable steps to compel the person to attend or find the person and secure their attendance. "Reasonable steps" does not mean every possible step take. In a ruling on unavailable witness in the criminal context T Forrest J stated "the Act does not impose a requirement of perfection, but merely that conduct be reasonable"[18]. Interestingly, a witness who has been excused from giving evidence by the Court may be unavailable for the purposes of the section[19].

Business records

19. A further exception to the hearsay rule is the exception allowing "business records" to be tendered as proof of their contents. To engage the exception, the Court or jury

[12] Section 64(2)(a)
[13] Section 64(2)(b)
[14] Section 64(3)
[15] Section 64(4)
[16] Section 63(2)(b)
[17] Section 5 of the dictionary
[18] *R v Aujla* (Ruling No 5) [2012] VSC 602 at [18]
[19] *Director of Public Prosecutions (DPP) v Nicholls* (2010) 204 A Crim R 306; [2010] VSC 397.

must be satisfied of the authenticity of the documents[20]. However, this does not mean that the traditional process of calling the maker of the document needs to be used.

20. A document, including a business record can be tendered pursuant to section 48 of the Act without the need to call the creator of the document. Further, the Court is entitled to examine a document on its face pursuant to sections 55 and 58 and determine the authenticity of the document.

21. To fall within the exemption, the representation within a business record must have been made by someone with personal knowledge[21] or on the basis of information supplied by someone with personal knowledge[22]. It must form part of the records of the business.

Relevance for a non-hearsay purpose

22. One of the biggest changes to the laws of evidence is encompassed in section 60 which provides that if evidence is admitted for a "non-hearsay" purpose then it admission does not breach the hearsay rule.

23. What that means in practical terms is that if a representation is admitted via some other mechanism in the Act, then evidence of the representation can be used as proof of the truth of its contents. Examples of other mechanisms in the Act which allow representations to be admitted include section 38 which allows a party to cross examine their own witness if the witness if they have given "unfavourable" evidence or appear not to be attempting to give truthful evidence. Likewise, evidence of a prior inconsistent statement[23] if put to damage a witness' credibility can then be used as evidence of the truth of that prior statement.

Opinion evidence - part 3.3

24. Opinion evidence is admissible if it is relevant (see above) and if the person giving the opinion is doing so based on their training, study and experience.

25. Whilst part 3.3 deals with the legalities of admission of expert evidence, parties should be aware of the admissibility requirements set out in Order 44 of the Supreme Court Rules including timing of service[24] and compliance with the expert code of conduct.

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[20] *Matthews v SPI Electricity Pty Ltd & Ors* (Ruling 35) [2014] VSC 59 at [30]
[21] *Matthews v SPI Electricity Pty Ltd & Ors* (Ruling 35) [2014] VSC 59 at [38]
[22] Section 69(2)(b)
[23] Section 106(2)
[24] Order 44.03(1)

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