ANNOTATED EVIDENCE ACT NEW SOUTH WALES

BY PHILIP SUTHERLAND

FOREWORD

The Hon Justice M D Kirby AC CMG

The commencement of the *Evidence Acts* in 1995 represents, by any measure, a major achievement of law reform. The terms of the New South Wales Act are substantially similar to the *Evidence Act* 1995 (Cth). By s 4 of the latter Act, it applies in relation to all proceedings in a Federal Court, a Court of the Australian Capital Territory and (by s 6) it extends to each external territory of the Commonwealth. By s 5 of the Federal Act, certain specific provisions apply to "all proceedings in an Australian Court". This is a wide coverage. But bringing the courts of the most populous State of Australia into the new regime is a remarkable development for a country not noted for uniform laws, which cannot even agree (at least during the Summer) upon the time of day.

Much of the credit for translating the ideas of law reformers into bold legislation must be given to the successive Ministers, Federal and State, who braved the controversies that inevitably surround any discussion of the law of evidence. But credit must also be given to Federal and State officials who persevered with complex and detailed legislation, consulted widely after the law reform reports were delivered and convinced hard-pressed governments that the reforming package should be enacted.

A tribute must also be paid to the reformers who saw such a major, complex and often controversial project through to completion. The Australian

Law Reform Commission (ALRC) received the assignment to undertake the investigation during the period that I served as its Chairman. It was a stroke of particularly good fortune that Mr Tim Smith, a Melbourne barrister, accepted appointment to the Commission. He was made Commissioner in charge of the project. He led a diverse and highly opinionated team of Commissioners, consultants and staff members through six years of effort. Painstakingly, by a series of discussion documents, meetings and ultimately draft legislation, Mr Smith piloted the vessel home. I pay tribute to Justice Smith (as he is now become) and to all those who worked with him.

Five of the major actors in the early work of the Commission did not live to see the legislation enacted. Sir Richard Eggleston (Victoria), Justice Harold Glass (NSW), Justice Frank Neasy (Tasmania), and Judge Trevor Martin (NSW) together with John Ewens QC (long-time First Parliamentary Counsel of the Commonwealth), helped to inspire a remarkable team. The legislation analysed in this book is a lasting monument to their lives in the law.

When the ALRC reports were finalised, they were placed under the scrutiny, at the Federal level, of the Senate Standing Committee on Legal and Constitutional Affairs and, in New South Wales, of the State Law Reform Commission. Although the reports of these bodies were generally favourable, the difficulties of actually achieving such a reform in Australia are so formidable that even now I am astonished that the legislation was enacted.

Virtually every page of this text will reveal controversies upon which different lawyers may hold different opinions. At the threshold of the ALRC work were a number of fundamental considerations. The introduction of a potential disparity between the evidence laws applied in Federal and State courts was hotly contested. The identification of the policy objectives of a modern law of evidence was by no means easy. The relevance and impact of new information technology and the decline of jury trial presented urgent problems and new opportunities. But the most heated debates invariably centred upon the

clash between those in the Commission (led by Mr Smith) who wanted to minimise judicial discretions and to formulate clear and binding rules and those (amongst whom I numbered myself) who favoured enlargement of judicial discretions as the price for radical simplification of evidence law. This is an old debate. Two hundred years ago a judge expressed his dread that the law of evidence should ever depend upon the discretion of judges rather than upon clear rules laid down to control the judges. See *R v Inhabitants of Eriswell* (1790) 3 TR 707; 100 ER 815 (KB), 819.

In the end, the views of Commissioner Smith prevailed. Upon such topics he showed himself to be a doughty and resourceful fighter. Yet early commentaries on the legislation have expressed concern at a perceived enlargement of the ambit of judicial discretions, effectively unreviewable in appellate courts (see C R Einstein, "Reining in the Judges?", Oct 1995). This feature of the legislation, and the equally controversial debates over codification of the law of evidence will be watched closely as the new statutes are tested in the unpredictable, heated circumstances of daily forensic contests.

As might be expected, the enactment of such major reforming legislation, and its relatively speedy commencement as law, has propelled the judiciary and the other members of the legal profession in Australia into urgent action. Seminars have been held. Papers have been circulated. Already, a number of texts have been produced. This book by Mr Philip Sutherland is a text for busy practitioners. By providing an annotated commentary on the New South Wales Act, Mr Sutherland has done a service which will contribute significantly to the smooth introduction of the new law. Usefully, he has annotated the statutory provisions with reference to the relevant sections of the ALRC reports. It is to be hoped that those reports will themselves become widely available. They contain a wealth of analysis, comparative material and criticism which will help to throw light upon the new Act. The law of evidence will continue to be of the greatest significance in criminal trials. In civil trials the frequent waiver of the

rules of evidence, which has been such a feature of court practice in recent decades, may ameliorate the phasing in of the new legislation. Such waiver is expressly contemplated by s 190 of the Act. But because decisions upon the admissibility of evidence, tendered in a trial, must typically be made quickly, often in dramatic circumstances, the utility of an annotation of such a major law, with its many novel features, cannot be doubted. As experience accumulates around the language of the provisions of the legislation, it may be expected that future supplements and new editions of this annotation will enhance its value still further.

A sign of the times is the author's inclusion of extracts from the *International Covenant on Civil and Political Rights* as an appended document. In the recent past, international human rights law has sometimes proved quite helpful, at least in common law countries with their developed rules of evidence. It may help to resolve some ambiguities and uncertainties in a principled fashion. See eg *Regina v Astill* (1992) 63 A Crim R 148 (NSWCCA), 157. Human rights norms are likely to be of increasing importance in the years ahead for the reasons explained by Justice Brennan in *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 42. I therefore welcome this supplementary document. It reminds the reader, whether judge, advocate or litigant, that the *Evidence Acts* must be read in a way that helps our courts to come at justice whilst at the same time defending the multitude of objectives of our trial system developed over the centuries. That system is itself changing under pressures of unacceptable cost and intolerable delay. It is therefore timely to have a new *Evidence Act* for the Commonwealth and for the State of New South Wales. As these Acts are seen to work, it may be expected that the pressure for their adoption in other States of Australia will become irresistible. This would, in turn, be a major contribution to the desirable goal of building a truly national legal profession able to operate in courtrooms throughout the nation.

Mr Sutherland's effort will make the passage to the new enlightenment easier for us all.

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