

# Review of the Uniform Evidence Acts

By

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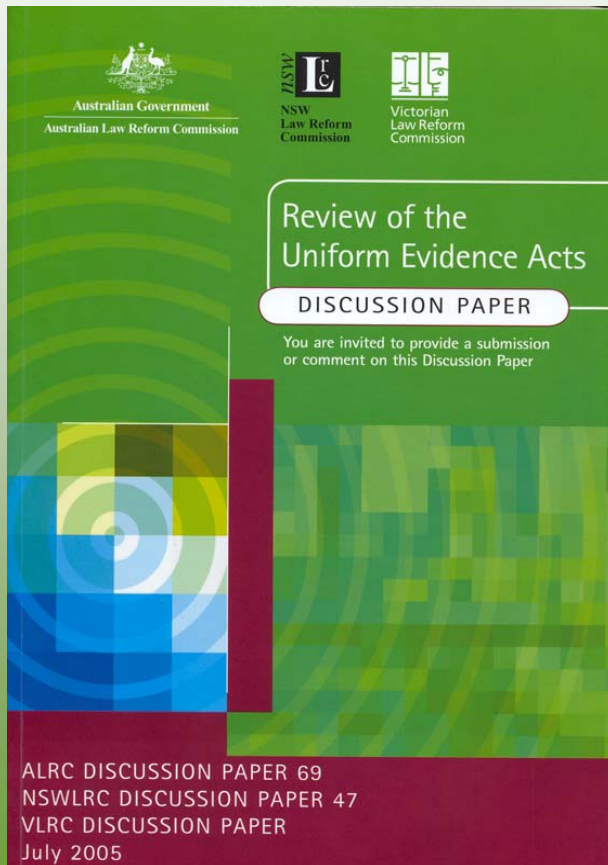
# Review of the Uniform Evidence Acts

## Timeline

- Issues Paper 28 released in December 2004
- Discussion Paper 69 released first week of July 2005
- Final Report to AG (Cth) 5 December 2005

## Law Reform Bodies Involved

- ALRC, NSWLRC and VLRC involved in writing DP 69 and the final Report
- TasLRI, QLRC, NTLRC and WALRC consulted on issues relating to the Review



# Consultations

## Consultations

- Consultations on IP 28 and DP 69 were conducted in all states, the ACT and the Northern Territory
- Focusing primarily on regular users of the UEA including:
  - Judicial officers
  - Barristers
  - State and Territory Bar Associations and Law Societies
  - DPP and Public Defenders
  - Legal Aid
  - State and Territory Attorney-General's and Solicitor General's Depts
  - Legal Academics
  - Other organisations such as AGS, HREOC, Aboriginal Interpreter Service (NT), NSW Rape Crisis Centre, Aboriginal Land Councils, etc

## Focus of Discussion

- Hearsay in civil proceedings
- The factual basis of expert opinion evidence and the impact of s 60
- The use of the discretionary and mandatory exclusions in Pt 3.11 UEA
- Client legal privilege
- Professional confidential relationship privilege

## Hearsay in civil proceedings

### Issues:

- Scope of s 59 – ascertaining whether a person intended to assert the existence of facts contained in a previous representation should be an objective test (Proposal 7-1)
- Scope of s 60 – UEA should be amended to confirm that s 60 operates to put beyond doubt that it applies to first-hand and more remote hearsay (Proposal 7-2)
- Proposed amendment to s 64(3) – civil proceedings if maker available – to remove the requirement that, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation (Proposal 7-3)
- Proposed movement of s 72 – contemporaneous statements about a person's health, etc – to Pt 3.2 (first-hand hearsay exceptions) (Proposal 7-7)

# The factual basis of expert opinion evidence

- Issue provoked much interest and comment in submissions and consultations.
- Sometimes difficult to distinguish concerns relating to the law of evidence from procedural concerns about the way in which courts control the adducing of expert opinion evidence.
- It is the view of the Commissions as expressed in DP 69 that s 79 does not require that the facts relied upon by an expert be proved or that it be demonstrated that they will be proved (see [8.79]).

## The factual basis of expert opinion evidence

- However, if important facts are not going to be established by admissible evidence independent of the expert's opinion, the UEA provides the following remedies:
  - The evidence may be limited under s 136 if there is a danger that a particular use of the evidence (eg for a hearsay purpose – s 60) might be unfairly prejudicial to a party or be misleading or confusing;
  - The failure to prove independently the factual basis may be extensive enough to require exclusion under s 135;
  - In extreme cases, the evidence may be excluded under s 55 as not meeting the test of relevance.

## Factual Basis of Expert Opinion Evidence and Impact of s 60

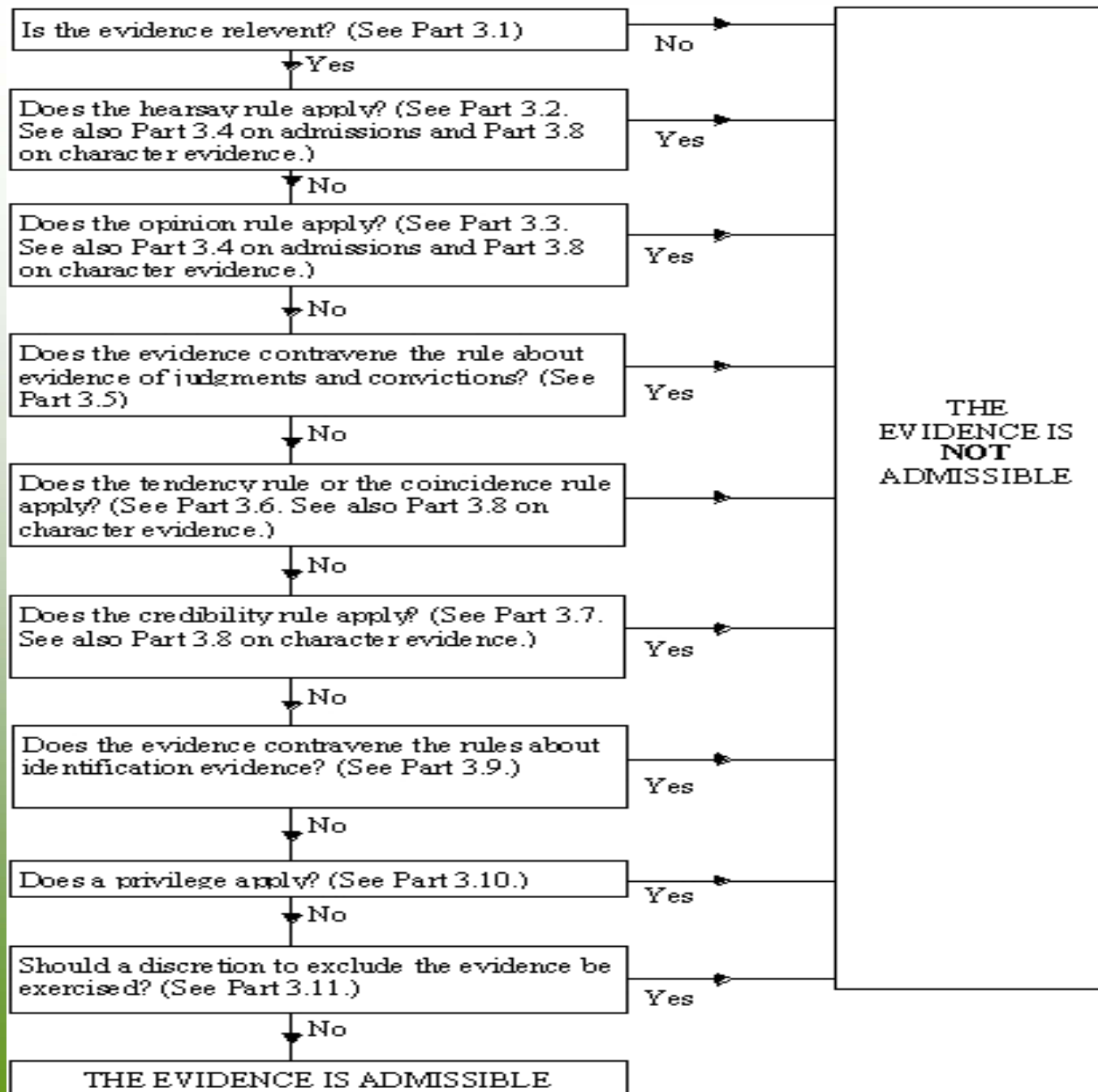
- The factual basis of expert opinion evidence
  - The scope of *Makita (Australia) P/L v Sprowles (2001) 52 NSWLR 705*
  - The ‘asserted factual basis approach’ and the ‘true factual basis approach’ in *ASIC v Rich* [2005] NSWCA 152
- Commissions are of the view that an example of the correct approach to the admissibility of expert opinion evidence when the facts upon which the expert opinion is based have not been proved independently is Branson J’s decision in *Sydneywide Distributors P/L v Red Bull P/L* [2002] FCAFC 157

# The role of lawyers in the preparation of expert reports

- Que – should lawyers be more involved in the preparation of reports by experts?
- DP 69 noted:
  - The Commissions received divergent views.
  - Dominant view is that lawyers should be more involved in the preparation of expert reports in order to ensure that expert reports are in an admissible form.
  - Primary rationale – lawyers are involved in the drafting of affidavits for lay witnesses, so there is no logical reason why they should be excluded from assisting the expert to prepare a report which complies with evidentiary rules.
  - Concerns that lawyer involvement may increase the risk that expert reports will adopt an overly partisan position can be addressed through rules of court, legal practitioner rules of professional conduct and expert witness codes of conduct.

## The use of the discretionary and mandatory exclusions in Pt 3.11 UEA

- Submissions and consultations indicate a tendency on the part of many judicial officers and practitioners to approach admissibility issues from a 'pigeon-hole' rather than a 'grid' perspective.
- This tendency is less pronounced in practitioners with less than 10 years experience.



# Client Legal Privilege

## Issues:

- Extension of the client legal privilege provisions to pre-trial processes and in non-curial contexts (Proposal 13-1)
- Expanding the definition of 'lawyer' in s 117 UEA to include a person who is admitted as a legal practitioner, barrister or solicitor in an Australian jurisdiction or any other jurisdiction (Proposal 13-3)
- Clarifying waiver of privilege under s 122 UEA to include, in addition to knowingly and voluntarily disclosed, acting in a manner inconsistent with the maintenance of the privilege (Proposal 13-5)

# Professional Confidential Relationship Privilege

- Proposal 13-7 – Part 3.10 of the *Evidence Act 1995* (Cth) should be amended to adopt the equivalent of Division 1A of the *Evidence Act 1995* (NSW)
- Controversial proposal in which opinion was divided in consultations and submissions