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# Update Summary

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**UNIFORM EVIDENCE LAW**

**Stephen J Odgers SC**

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Stephen Odgers has provided the following updates to:

#### Chapter 1A- updated references and commentary

- *McNamara v The King* [2023] HCA 36

#### Chapter 2 Preliminary Matters: updated references and commentary

- *McNamara v The King* [2023] HCA 36 at [55]: updated commentary

#### Chapter 3- Adducing Evidence: updated references and commentary

- *Lantrak Holdings Pty Ltd v Yammine* [2023] FCAFC 156 at [27]-[28].
- In *Nguyen v The Queen* (2020) 269 CLR 299 the High Court observed at 311 [26] that "[t]he conduct of a criminal trial is subject to practices and procedures which ... may be informed by principles or rules which are regarded as fundamental to the conduct of a criminal trial".
- In *Ngo v R* [2023] NSWCCA 201, Adamson JA observed at [96] that "the prosecutor had no obligation to put to the applicant in cross-examination those matters about which the complainant had given evidence *which did not form part of the Crown case*".
- In *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* [2023] HCA 32 a majority of the High Court (Kiefel CJ, Gageler and Jagot JJ) stated at [60]: "A court is not bound to accept uncontradicted evidence. Uncontradicted evidence may not be accepted for any number of reasons including its inherent implausibility, its objective unlikelihood given other evidence, or the trier of fact simply not reaching the state of 'actual persuasion' which is required before a fact may be found."

#### Chapter 4A- Relevance: updated references and commentary

- *Adams v The King* [2023] NTCCA 7
- *McNamara v The King* [2023] HCA 36
- *Macdonald, Ian v R; Edward Obeid v R; Moses Obeid v R* [2023] NSWCCA 250 at [124].

#### Chapter 4B- Hearsay-

- 4B updated references and commentary
- *Conway v The Queen* (2000) 98 FCR 204; [2000] FCA 461 at [154]. This should be distinguished from the situation where A makes a

representation in a document that B made an admission. The representation in the document is first-hand hearsay that B said the words but is second-hand hearsay of the fact or facts admitted by B: see, for example, *Glowacki v The King* [2023] VSCA 176 at [15]–[18].

- Notwithstanding the difficulty in reconciling the actual result in *Harris* with the reasoning in *Williams*, it is suggested that *Williams* should still be regarded as good law. A condition of admissibility under this provision is that the statement “be made spontaneously during (“when”) or under the proximate pressure of (“shortly after”) the occurrence of the asserted fact”. That has been accepted by the Victorian Court of Appeal
- *Discussion of Gesler v State of Tasmania* [2023] TASCCA 10
- *Huici v The King* [2023] VSCA 5 at [57]; *Moore (a pseudonym) v The King* [2023] VSCA 236 at [51]
- *Update EA.65.360 -subsection title change*

#### Chapter 4C Opinion

- 76.90 General Comments: Updated references and commentary
- 77.60 General comments: updated references and commentary
- Section 78 commentary: in *Gan v Xie* [2023] NSWCA 163 the NSW Court of Appeal held that a witness was permitted to express an opinion as to the “gist” or “effect” of a conversation he or she had heard, since the opinion was based on what he or she had heard and otherwise perceived about the conversation and, since the witness could not recall every word spoken, it was necessary to receive the opinion to obtain an adequate account or understanding of what he or she perceived of the conversation.
- Section 79 commentary: It has been pointed out that “intuition, like “speculation”, is not reasoning and does not disclose a reasoning process leading to the formation of the opinion. Further, while experts

commonly extrapolate from existing data, there is a limit to such extrapolation.

- Section 79 commentary: *Lang v The Queen* [2023] HCA 29, discussion
- 79.300- Discretionary Exclusion: However, the approach suggested above to the assessment of “probative value” in respect of expert opinion evidence appears to have been supported by the joint judgment of Kiefel CJ and Gageler J in *Lang v The Queen* [2023] HCA 29

#### Chapter 5- Part 3.4- Admissions

- S 81 commentary: It has been held that the bringing of a “confidentiality proceeding” in respect of a witness statement, taken with the silence of the parties in that context as to whether they denied, or did not admit, the truth of the contents of the statement, amounted to a clear representation as to the truth of those contents
- Deciding whether an implied representation has been made by conduct (including by silence or failure to act) the court must consider all the circumstances: *Millsave Holdings Pty Ltd v Connective Group Pty Ltd* [2023] VSCA 326 at [93].
- Evidence of the circumstances in which the admission was made: updated commentary
- EA 87.180: Use of a previous representation under s 87(2)- updated references and commentary
- EA 89.90 General comments- updated references and commentary

#### Chapter 5A- Evidence of Judgments and Convictions

- EA.91.60- General comments- updated references and commentary

#### Chapter 5B- Part 3.6- Tendency and Coincidence

- **Update to EA.76.90 General comments:** an opinion is, in substance, an inference drawn or to be drawn from observed and communicable data. That explains the exclusionary rule. As observed in *Lang v The Queen* [2023] HCA 29 at [6].

- In *Habambo v R* [2023] NSWCCA 328 it was held at [223] that expressions of opinion in text messages were relevant to the credibility of the person who expressed those opinions (in that they were in effect prior inconsistent statements with respect to the person's evidence as a witness).
- *Honeysett v The Queen* (2014) 253 CLR 122; 237 A Crim R 589; [2014] HCA 29 at [21].
- **Update to EA 78.60 General Comments:** In *Gan v Xie* [2023] NSWCA 163 the NSW Court of Appeal confirmed at [120] the view that this provision would permit a witness to express an opinion as to the "gist" or "effect" of a conversation he or she had heard.
- **Update to EA 79.180 "Wholly or substantially based on that knowledge" (s 79(1)):** It has been pointed out that "intuition, like "speculation", is not reasoning and does not disclose a reasoning process leading to the formation of the opinion.<sup>1</sup> Further, while experts commonly extrapolate from existing data, there is a limit to such extrapolation. As observed by the Supreme Court of the United States in relation to the federal rule of evidence, in a passage endorsed by two members of the High Court.
- **EA.79.240 "the basis rule" new commentary:** As Kiefel CJ and Gageler J have pointed out in *Lang v The Queen* [2023] HCA 29 at [15]-[17], "the degree of cogency of the reasoning" engaged in by an expert does not "go to the admissibility of a resultant opinion" (except where discretionary exclusion is sought).
- **EA 79.300 Discretionary Exclusion:** new commentary: However, the approach suggested above to the assessment of "probative value" in respect of expert opinion evidence appears to have been supported by the joint judgment of Kiefel CJ and Gageler J in *Lang v The Queen* [2023] HCA 29

## Chapter 6

- **3.7- Credibility [EA.104.240] Cross-examination of D1 by D2 where D1 has given evidence adverse to D2 (s 104(6)) :** Updated references and commentary
- **EA.108A.90 Criminal Proceedings:** Where evidence of the previous representation is adduced by the prosecution as an admission, this

provision would have application where the defence seeks to adduce “credibility evidence” in relation to the admission.

## Chapter 6B

- **EA.114.80:** In *Harika & Anor v The King* [2023] VSCA 317 it was conceded (see Macauley JA at [94]) that it would have been unfair to the defendant had the police sought his consent to participate in an identification parade when “a doctor had assessed him to be unfit to be interviewed” and if the police themselves “believed him unfit to be interviewed”.
- **EA.114.210:** in *Fowkes v The King* [2023] VSCA 160 discussion

## Chapter 7A-part 3.11 Discretionary and Mandatory Exclusions

- **EA.135.270 Criminal Proceedings: *McNamara v The King* [2023]** HCA 36 commentary
- **EA.137.90 “Probative Value”:** One way of applying this definition is to consider the potential of the evidence to assist the tribunal of fact. In *Smith v The Queen* (2001) 206 CLR 650; 75 ALJR 1398; [2001] HCA 50
- *IMM v The Queen* (2016) 257 CLR 300; 90 ALJR 529; [2016] HCA 14 discussion
- In *Moore (a pseudonym) v The King* [2023] VSCA 236 discussion

## Chapter 8- Proof

- Section 140 Commentary- updated references and commentary
- EA 141.120- Circumstantial Evidence- updated references and commentary
- EA 141.180- The Case of Defendant- updated references and commentary
- Part 4.2- Judicial Notice- Updated references and commentary  
*McDiarmid v R* [2023] NSWCCA 322
- Part 4.5 Warnings and information- EA 165.150- If there is a jury- updated references and commentary
- EA.165.360- Updated references and commentary
- Part 4.4 Corroboration- Updated references and commentary

## Chapter 10

- Ss 182- 198 Judgments and convictions- Updated references and commentary

## Chapter 11 (Dictionary)

