

BOOK REVIEW

Jeremy Gans and Andrew Palmer, *Uniform Evidence* (Oxford University Press, 2010)

The *Evidence Act 2008* (Vic) came into force in Victoria on 1 January 2010. The practical effect of this legislation is that the rules regulating the admission of evidence in Victorian courts have now come into line with those of other uniform evidence jurisdictions in Australia — in particular, New South Wales¹ and the Commonwealth.² Victoria's old evidence regime, which was based largely on the common law, has been superseded. While many of the old fundamental rules have survived and been codified by *Evidence Act 2008* (Vic), most of these have been at least partially reformulated. Moreover, there are entirely new rules and concepts with which seasoned court room practitioners will be totally unfamiliar.³ Naturally, Victorian legal practitioners, academics and students alike will be eager to acquire a textbook that adequately explains the new regime. Gans and Palmer's *Uniform Evidence* is one such text that does this very well. As the title of the book suggests, its target audience extends beyond the borders of Victoria to all uniform evidence jurisdictions in Australia. However, it is noteworthy that the book's authors are academics from one of Victoria's leading law schools. In writing the book, the authors would seem to have been conscious of the fact that their Victorian audience is likely to be unfamiliar with the uniform evidence provisions and the significant body of case law that has developed from the application of those provisions in New South Wales and Commonwealth courts.

The authors make it clear at the outset of the introductory chapter (no doubt, with Victorian readers in mind) that the uniform evidence law 'is *not* a radical change to the previous law'.⁴ The introduction proceeds to set out, very usefully, the fundamental principles underpinning rules of evidence, these principles being common to both common law and uniform evidence law regimes. The development of the uniform evidence law is then explained. The authors remind us that the uniform evidence law does not purport to be a code, that the common law must inevitably fill gaps in its framework, and that provisions in other statutes may override or constrict the interpretation of the uniform evidence provisions. Importantly, attention is drawn to the potential for provisions in the *Evidence Act 2008* (Vic) to be interpreted differently by Victorian courts in light of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). Ultimately, the

1 See *Evidence Act 1995* (NSW).

2 See *Evidence Act 1995* (Cth). For the most part, the provisions of the *Evidence Act 2008* (Vic) are substantially the same as those contained in its New South Wales and Commonwealth counterparts. There are some points of divergence between the three pieces of legislation. However, these differences are few and arguably minor in terms of their effect on the overall 'uniformity' of the three regimes.

3 For example, the exceptions to the hearsay rule under s 60 (hearsay use of evidence adduced for a non-hearsay purpose) and ss 62–7 (first-hand hearsay).

4 Jeremy Gans and Andrew Palmer, *Uniform Evidence* (Oxford University Press, 2010) 1 (emphasis in original).

introductory chapter leaves a significant impression that this book is a useful first point of reference on the subject of the law of evidence in the uniform evidence jurisdictions. Throughout the book, the authors do not assume their audience has a pre-existing knowledge of the common law rules of evidence. It is clearly intended as a stand-alone text. To the authors' credit, the book seems to strike a fair balance between the need for providing a succinct explication of essential relevant legal principles on the one hand (critical for practitioners), and elaborating upon and discussing points of academic concern on the other (critical for students and academics).

Following the introduction, the book is divided into three parts. Part 1 (chapters 2 and 3) deals with the evidential rules relating to 'adducing evidence', covering the essential basics of courtroom procedure such as the rules relating to the competence and compellability of witnesses, the questioning of witnesses, and the distinction between oral, documentary and real evidence. Part 2 (chapters 4 to 16) represents the bulk of the book, being devoted to the rules of admissibility. Finally, Part 3 (chapters 17 to 20) deals with procedural rules relating to proof and jury directions. Generally speaking, the sequence and subject matter of each chapter has been conveniently synchronised with the sequence of rules in the uniform evidence legislation. Each chapter commences with a brief introduction that states the relevant evidential rules and their practical purpose in the courtroom. The relevant provisions are then identified with their rationales more fully explained. The authors make every effort to identify the essential constituent parts of each statutory rule and explain them in light of decided cases and, where relevant, the old common law. In this respect, the authors have produced what is essential in any good text on uniform evidence law.

One of the more unusual features of the book is the authors' use of algorithmic flowcharts appearing at the end of many chapters that concern particular rules of admissibility (see, for example, Figure 6.3 reproduced at the conclusion of this book review).

It is likely that the authors were inspired by the legislature's use of a basic flow chart of this nature in the uniform evidence legislation.⁵ The flowcharts are obviously designed to assist users of the legislation in applying the many rules, and exceptions to the rules, that are potentially relevant to a particular piece of evidence. Essentially, for any given piece of evidence, the flow chart poses a series of 'yes'/'no' questions in boxes, with each question put being determined by the operation of a particular statutory provision. The answer to each question will determine which question is asked next, and in this respect the reader is directed by an arrow to the next box with the next question. Eventually, navigation of the flowchart will provide a clear answer to the ultimate question — is this particular piece of evidence admissible? The first impression one has of these flowcharts is that they are a very sophisticated product of the authors' commendable efforts in transforming the provisions of the legislation into a series of questions, in

5 The flowchart appears at the commencement of Chapter 3 of the uniform evidence legislation (immediately preceding s 55): see, eg, *Evidence Act 2008* (Vic).

algorithmic format, that the legislation requires to be asked and answered for any given piece of evidence. However, upon reflection, and after attempting to navigate the charts as a practical exercise in assessing the admissibility of a piece of evidence, one may quickly come to the realisation that they are more of a hindrance than a help. At times, the flowcharts force the reader to ask and answer up to thirty questions before an answer to the ultimate question of admissibility is produced. Yet most of these questions asked in relation to the particular evidence being considered are irrelevant and would not consciously be contemplated as a matter of practice. It is at this point that one realises that the authors' flowcharts depict every question that is, *in theory*, relevant for the purposes of the legislation. The practical reality, however, is that no practitioner would have to ask and answer all of the questions posed by a flowchart on any given occasion. Perhaps the authors would respond to this criticism by stating that the flowcharts are not intended to be applied rigorously on every occasion, and that practitioners may simply use that part of a flowchart that the particular piece of evidence demands. That may be so. But that only raises further questions. Where does one start in the flow chart? Would it not be quicker simply to refer to the relevant provision in the legislation itself, and work through the rules from there? In the end, the flowcharts, with their many questions and the occasional 'speed hump' (where arrows are forced to intersect for want of room on the page), unnecessarily depict the rules of evidence as being overly complex. They may well have the effect of overwhelming their audience with an unfounded sense that the uniform rules of evidence are more complicated than they actually are. For this reason, the flowcharts may be seen as an undesirable feature of the book.

Apart from this criticism, there are few others of significance that warrant mentioning in this review. Once such criticism, however, may be directed at chapter 5, notionally devoted to the hearsay rule (s 59), but in which the authors also decide to deal with two of the exceptions to the hearsay rule (ss 60 and 66A). This placement of discussion on ss 60 and 66A seemed particularly counter-intuitive given that the authors had devoted chapter 6 to the hearsay 'exceptions'. Why were ss 60 and 66A not dealt with in that chapter? The authors explain the apparent discrepancy as being due to ss 60 and 66A significantly affecting the scope of the hearsay rule itself, and hence they are appropriately dealt with in the context of discussing the primary rule.⁶ The difficulty with this explanation, however, is that it clearly runs counter to what appears on the face of the uniform evidence legislation. Sections 60 and 66A are very clearly stated in the legislation as being 'exceptions' to the hearsay rule. Moreover, in their practical application they clearly are exceptions. The authors' explanation for not dealing with them in chapter 6 is not entirely convincing.

The noted criticisms should, however, be regarded as peripheral to the substantive qualities of the book. Ultimately, it is this reviewer's opinion that the book is an excellent resource for practitioners, students and academics alike, especially in Victoria. Finally, it is worth mentioning that, since publication of the book at the beginning of 2010, the Victorian Court of Appeal has produced a number of

6 Gans and Palmer, above n 4, 80.

decisions of practical significance concerning the application of provisions of the *Evidence Act 2008* (Vic). The authors will no doubt be aware of this developing jurisprudence. This reviewer certainly looks forward to the second edition of *Uniform Evidence* in which the emerging Victorian case law will likely receive considered attention.

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Figure 6.3 Hearsay exceptions: criminal prosecution evidence

