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# Australian Principles of Evidence (2nd Ed, 2004), Jeremy Gans and Andrew Palmer, Cavendish Publishing Limited

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# Australian Principles of Evidence (2nd Ed, 2004), Jeremy Gans and Andrew Palmer, Cavendish Publishing Limited

**Abstract**
[extract] I write this review as an outside observer of Australia law. I hail from Canada. However, over the past decade I have had the opportunity to teach evidence in Australia on a number of occasions. Each time I need to re-learn the law. So it was that I came upon Australian Principles of Evidence (2nd edition). In this review, therefore, I share with you my perspective as an outsider, teacher and student of Australian evidence law.

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# BOOK REVIEW

## AUSTRALIAN PRINCIPLES OF EVIDENCE (2nd ed, 2004), Jeremy Gans and Andrew Palmer Cavendish Publishing Limited

*By Lee Stuesser*[1]

I write this review as an outside observer of Australia law. I hail from Canada. However, over the past decade I have had the opportunity to teach evidence in Australia on a number of occasions. Each time I need to re-learn the law. So it was that I came upon *Australian Principles of Evidence* (2nd edition). In this review, therefore, I share with you my perspective as an outsider, teacher and student of Australian evidence law.

What immediately caught my eye was that on page one of the text there is a quote from a leading Canadian author on evidence. This foreshadows the breadth of vision that you will find in the text. Throughout there is constant reference to developments in the law in the rest of the common law world, which may help to inform the Australian law. For example in Chapter 13 'Tendency and Coincidence' [commonly called similar fact], there is considerable discussion of the Supreme Court of Canada's recent decision in *R v* Handy [2002] 2 SCR 908. In *Handy* Canada's highest court provided a framework for admitting 'similar fact' evidence. Given the confusing state of Australian law in the area, the *Handy* decision may provide a useful guide in reforming the law.

One difficulty in teaching and in learning Australian evidence is the fact that there are nine different jurisdictions and there is no uniform evidence law for the country as a whole. Therefore, it is difficult to state the law in one simple or acceptable way. One is compelled to comment upon the respective state practices. The degree of differences has been somewhat clarified in that four jurisdictions now have similar uniform evidence legislation based upon the Australian Law Reform Commission's Report on Evidence. So we have a narrower distinction between the four 'uniform' jurisdictions (New South Wales, the Commonwealth, Australian Capital Territory and Tasmania) and the remaining 'common law' states. But this still means that there is a tendency to speak with at least two voices on each issue: 'The uniform legislation says' and 'The common law says'. Repetition cannot be avoided. The authors take the view that it is best to discuss

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the common law and uniform legislation together. They are correct. The uniform legislation both reflects and reforms the common law and the fundamental point is that in order to understand the uniform legislation one needs to know the common law. To the authors credit they do not just recite the common law and the uniform legislation; they intertwine the two into a more readable whole.

One common complaint from those who teach in Queensland, is we would like more reference to Queensland law. This is especially so since Queensland, in many respects, is going its own way in reforming evidence law. For example, Queensland recently made spouses of accused persons competent and compellable for the prosecution in criminal cases [See *Queensland Evidence Act* s. 8]. Spousal privilege was also repealed at the same time. In comparison, the uniform legislation allows for spouses, de facto spouses, parents or children of a defendant to object to testify or to give evidence of communications between the person and the defendant. [See s. 18 and 19 of the *Commonwealth Evidence Act*]. As can be seen, Queensland definitely does not seem prepared to adopt the uniform legislation!

The fundamental aim of the text is 'to state the law of evidence in a form which can be readily understood and easily applied by both tertiary students and legal practitioners'. [Preface p. vii] Emphasis is on principle, which may help the reader to understand at times complex, confusing and contradictory case law. For the most part the authors succeed. The prime example is Chapter 8 'Relevance'. This chapter is a beautifully simple and clear discussion of relevancy. What makes it so is its crisp writing, good use of headings and useful providing of examples. One cannot underestimate the clarifying power of a good example to illustrate the law. At times other chapters are not so clear. For example, Chapter 1 'Introduction' is more wordy and abstract in tone and as a result is not as crisp or clear.

A challenge for any text on evidence is where to begin and how to organise the law. In the 1st edition of the text, Andrew Palmer followed the organisation of the uniform evidence legislation, because in his opinion 'the method of organising the law of evidence contained in the uniform evidence legislation is vastly superior to the traditional methods of organising the subject, both conceptually and in terms of ease of understanding' [1st ed. at p. 4]. Accordingly, the 1st edition divided the subject into three main groups: 1) Adducing Evidence, 2) Admissibility of Evidence and 3) Proof. The 2nd edition abandons this framework, in a reversal that would make politicians proud. The 2nd edition is organised under three broad topic headings: Part I 'Means of Proof', Part II 'Uses of Evidence', and Part III 'Limitations on Prosecution Evidence'. In my opinion the new organisation does not work well. The result is that the text lacks a unifying flow. Chapter 7 'Privilege and Immunity' simply does not fit into Part I 'Means of Proof'. In the 1st edition, the more specific chapter 'Admissions and Confessions By the Accused' followed the chapter on 'Admissions'. There is a flow and connection between

these topics. In the 2nd edition, admissions are dealt as a part of Chapter 10 and 'Admissions to Investigators' is dealt in Chapter 19. In the 1st edition 'Tendency and Coincidence Evidence' was followed by a chapter on 'Tendency and Coincidence Evidence: The accused'. Once again, there is a flow and cohesion between these topics. In the 2nd edition, 'Tendency and Coincidence' evidence is found in Chapter 13 and Chapter 16 deals with 'Other Misconduct By the Defendant'. I think that readers will better understand the specific criminal law applications of admissions or 'tendency and coincidence' evidence if dealt with as a whole. I recognise that organisation of evidence law is not easy and reasonable people may disagree. However, the most compelling reason to revert to the former order is that it is the order of the uniform evidence legislation. Readers in those jurisdictions would then have a familiar path to follow in understanding the law.

A text on the law of evidence, and any law text for that matter, should both explain and guide. The authors have a wealth of knowledge on the law and it is incumbent upon them not only to explain the law, but also guide to its development and lead to its reform. In this regard, the text should be stronger. Where appropriate, the authors should take a stand. Unfortunately, too often the authors present the contradictory positions on the law without further comment. Here are some examples:

- There is a live issue as to the admissibility of 'similar fact' incidents even though the accused was acquitted of the earlier incident. Take the situation where the accused is charged with sexual assault. The Crown has evidence that on three prior occasions the accused acted in a similar manner, but he was acquitted in each case. The House of Lords in *R v* Z [2000] 3 All ER 385 found that an acquittal did not bar the prosecution from leading the evidence of the prior 'similar fact'. The authors note the issue without further comment [See p. 373].
- In the admitting of hearsay under the uniform legislation s. 65(2)(b) the legislation speaks of representations 'in circumstances that make it unlikely that the representation is a fabrication'. Section 65(2)(c) refers to representations 'made in circumstances that make it highly probable that the representation is reliable'. There is a live issue as to how to interpret 'in circumstances'. Is the judge confined to simply looking at the facts surrounding the making of the statement or may the judge also consider other evidence that confirms or collaborates the statements? There is high authority on this issue from both Canada and the United States. [See: *R v Starr* (2000), 147 C.C.C. (3d) 449 (SCC) and *Idaho v Wright* 497 US 805 (1990).] Once again, the authors note the issue without further discussion. [See pp. 204 and 205]
- Another live issue is whether the law should recognise an 'innocence at stake' exception for otherwise privileged communications between a lawyer and client. To be sure, a majority of the High Court in *Carter v Managing Partner, Northmore Hale Davy & Leake* (1995) 183 CLR 121

> refused to recognise such an exception. In contrast, section 123 of the uniform legislation would admit this evidence. Which is the path to follow?

The authors can make very valuable contributions, as text writers, to mould the law and I urge them to do so in subsequent editions.

I will end, where I began. When I returned to Australia to teach evidence law I opened the Gans and Palmer text. It was hot off the press and was very helpful to me. As both a teacher and student of the law, if it was helpful to me, I am sure that will be invaluable to students and practitioners alike. The text does achieve its purpose of stating the law in a readily understood and easily applied manner. The authors are to be commended. Well done.