



# Life after the UEA: How uniform evidence law has impacted recordkeeping in the Commonwealth and NSW

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# Overview

- Background to the Uniform Evidence Acts
- Key changes brought in under the UEA
- Implications for recordkeeping
- Moving forward – e-discovery and the courts

# Why does evidence law matter?

- Evidence law provides the “language” of litigation – the rules by which facts can be proved in court
- **Any** organisation that is ever involved in legal action (civil or criminal) needs to be able to provide evidence that supports its position, or it will inevitably suffer loss
- Documentary evidence is the cornerstone of many cases (particularly civil cases)

# Background

- Uniform Evidence Acts came into force in the Commonwealth and NSW in 1995.
- Result of an extended period of consultation, review and drafting, dating back to 1979.
- Aimed to produce a unified, consistent, modern and flexible codification of law which would both simplify and improve the evidentiary process in court.

# Why unify evidence law?

- Every jurisdiction in Australia operated under different and sometimes mutually incompatible rules of evidence
- Rules were derived from past cases (common law) law built up over time
- This leads to confusion, complexity and uneven outcomes in evidentiary admissibility

# Why modernise evidence law?

- Common-law jurisdictions have not kept pace with changing business practices and technology
- Case law accrues over time and can lead to excessive complexity in order to be responsive to different fact situations

# What is the state of play nationally?

- Uniform Evidence Acts in the Commonwealth and NSW from 1 Jan 1995 (mirror legislation)
- Tasmania introduced mirror legislation in 2001
- ACT and Norfolk Island also adopted UEA
- Victoria's adapted version of the UEA will come into force by 1 January 2010
- Other states and territories remain common-law jurisdictions with evidence legislation that collects some of the principles of common law

# Key principle of evidence

- Under the UEA jurisdictions, the focus of evidence law is on ensuring that all relevant, reliable evidence is heard
- This improves the fairness of outcomes as it provides the widest possible range of facts to allow the jury or judge to make a determination

# Evidence Act 1995 (Cth)

- A large number of key change areas
- Relevant ones for documentary evidence are:
  - Greater admissibility of hearsay evidence
  - Abolition of the “original as best evidence” rule
  - More standardised and less burdensome methods of proving business records / documents in evidence
  - Explicit repudiation of bias against electronic records
  - Improved pre-trial procedures which allow analysis of documentary evidence before trial

# Evidence Act 1995 (NSW)

- Initially a straight mirror of Commonwealth legislation
- Subsequent provisions have included some modifications to NSW law that have not been replicated in Commonwealth – no longer identical

# Implications for recordkeeping

1. Greater admissibility of hearsay evidence
  - First-hand hearsay is generally admissible now
  - This removes one of the biggest (theoretical) barriers to the admission of documentary evidence
  - But note – there has always been a business records exception!

## 2. Abolition of the “original as best evidence” rule

- Married to the relevant Electronic Transactions Acts, this rule change removes any basis for exclusion of imaged / scanned copies of paper records
- In these jurisdictions, therefore, there has been a move towards normalising of scan-and-shred practices within tightly defined boundaries

### 3. Proving business documents

- There has always been a mechanism for proving business documents in court
- The UEA simplifies the mechanism and provides a bias in favour of accepting business documents as true & correct

## 4. Removal of bias against electronic documents

- Presumption is that electronic records are as reliable as paper records in the absence of information showing the contrary
- The Acts are format-neutral in this regard

## 5. Pre-trial procedures

- Provision is made for more extensive and systematised pre-trial inspection of documentary evidence, both by parties and by the court
- This is supported by increasing moves to formalise discovery processes around e-discovery

# Practice notes and e-discovery

- Recent move among courts towards providing guidance and direction about acceptable methods and processes for e-discovery
- E-discovery is now increasingly considered a normative – or even THE essential – part of the discovery process

# In non-UEA states

- Some directions on e-discovery do exist, but they are general in nature
- Victoria: Practice Note 1 of 2007 – gives guidance, not mandatory rules
- Other states have similarly open / flexible rules

# In NSW

- Practice Notes SC Eq3 (July 2007) and SC Gen 7 (August 2008)
- These adopt a more flexible approach than the Federal Court, BUT, partly because they are supported by the Evidence Act 1995, the presumption of discovery has been reversed

# In Commonwealth

- Federal Court's draft Toolkit goes the furthest in specifying how e-discovery should progress – consists of:
  - Practice Note 17
  - Pre-discovery & pre-trial checklists
  - Default protocol (for discovery of 200 – 5,000 documents) and Advanced protocol (for discovery of <5,000 documents)

# Federal Court direction

- Partly because of the solid basis provided by the Evidence Act 1995, the Federal Court has been able to be quite directive in its e-discovery protocols
- For instance, the document exchange format is specified (searchable PDF)
- This should make litigation easier for all parties (in theory)

# Conclusion

- The UEA has created a simplified and more coherent structure for evidence law and the introduction of documentary evidence in particular
- However, the need for records to be demonstrably well-managed, authentic and accurate is as great as ever if you wish them to be accepted as proof!

# Further reading

- Records in Evidence (National Archives of Australia)  
<http://tiny.cc/uHqYC>
- Understanding the Evidence Act 1995 – A Daunting Task (Supreme Court of NSW)  
<http://tiny.cc/oKBGQ>
- Electronic Evidence, Document Retention & Privacy (Malleson Stephens Jaques)  
<http://www.mallesons.com/publications/2006/Mar/8367966w.htm>

# Further reading

- Federal Court E-Discovery Toolkit 2008  
<http://www.dev.azuredemoecourt.com/etoolkit/>
- Victorian Supreme Court Practice Note 1 of 2007  
<http://tiny.cc/2sQe9>
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# Further Information

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