

Uniform Evidence Law

by Stephen Odgers; Federation Press, 1995; 353 pp; \$50 softcover.

Annotated Commonwealth Evidence Act

by Philip Sutherland; LBC Information Services, 1995; 516 pp; \$55 softcover.

A Guide to the Evidence Act 1995 (Cth)

by J.D. Heydon; Butterworths, 1995; 211 pp; \$50 softcover.

The law of evidence has been under law reform review for so long that it seems amazing that something has finally come of it all. The New South Wales Law Reform Commission first received a reference on the law of evidence in 1966. The Australian Law Reform Commission received its own reference in 1979, and eight years later submitted its final report, recommending that the law of evidence be comprehensively restated in statutory form. Eight years further on, the Commonwealth and New South Wales Parliaments did just that, passing substantially identical legislation based, in the main, on the ALRC's draft Bill. The Acts came into force on 18 April and 1 September 1995 respectively. The Standing Committee of Attorneys-General has agreed to consider following the Commonwealth and New South Wales lead, so it is not inconceivable that by the end of the decade uniform evidence legislation could apply in all Australian jurisdictions.

The reforms brought about by the Acts are far too numerous to list, but their general thrust is to introduce a greater degree of flexibility into the law of evidence, and to place more discretion in the hands of the trial judge. In the long term this will hopefully result in more attention being given to the probative value of a particular piece of evidence, in light of the use to which it can permissibly be put; and correspondingly less attention being given to the question of whether the evidence in question meets the technical definition of a particular rule of exclusion. The new law of evidence will no doubt take some getting used to, so it should come as no surprise that the publishing industry has collectively spotted an opportunity. Writing this review feels a bit like writing for *Choice* magazine: each of the books is intended to serve the same purpose, two of them follow the same format, and many of the annotations refer to precisely the same material. So which one is the best?

The least useful it seems to me is Heydon's *Guide to the Evidence Act*. This is an odd book with no real cohesion between its constituent parts. Those parts comprise Heydon's commentary on the Act, together with the legislation. The commentary seems designed to serve two purposes: first, to summarise the various provisions of the Act; and secondly, to expose shortcomings in its drafting. But unlike the other two works where the commentary is integrated with the legislation, in Heydon's book the commentary and legislation are kept separate. This means that when referring to a section of the Act one is unaware of whether or not there is any commentary about that section; and when reading the commentary, one is unable to look at the relevant section at the same time. No doubt this format is explained by the fact that the commentary has also been produced for inclusion in the looseleaf and bound editions of *Cross on Evidence*. If you have access to either of these works — as you should — then the works under review here are redundant. If you do not, then I would suggest that the article by Mr Justice Smith, 'The More Things Change the More They Stay the Same? The Evidence Acts 1995 — An Overview' (1994) 18 *UNSWLJ* 1 provides a more accessible summary of the Act, and that Odgers and Sutherland both provide a more detailed and useful section by section analysis of the legislation.

The choice between Odgers and Sutherland is a more difficult one to make because the two works have such similar formats. Both contain a brief introductory overview of the Act and its aims, and then reprint the Act and related legislation together with a section by section commentary. Even the commentary has much in common, for both list the references to the relevant paragraphs of the two ALRC reports on which the Act was based and to other institutional material such as the ex-

planatory memoranda. Although Sutherland's references are probably more exhaustive, when one looks at the quality of the commentary each work offers, it becomes clear that Odgers' is by far the superior work. His analysis of each section is clear and to the point, and succinctly places the new law in the context of the old. Sutherland's commentary is far less helpful. For example, when discussing the new hearsay rule, Sutherland digresses into a lengthy analysis of the High Court's decision in *R v Benz* (1989) 168 CLR 110. *Benz* no doubt provides an example of the kind of 'unintended representation' (to use the terminology of the Act) or 'implied assertion' (to use the terminology of the common law) which is no longer to be considered hearsay, but why it was thought necessary to discuss each judgment in that case is beyond me.

The quality of the commentary is enough on its own to give Odgers victory; but there are several other advantages to Odgers' work. First, the paragraph numbers in *Uniform Evidence Law* correspond to the section numbers of the Act; those in the *Annotated Commonwealth Evidence Act* do not. Secondly, *Uniform Evidence Law* covers both the Commonwealth and NSW Acts, whereas Sutherland has written separate volumes for each Act (the *Annotated New South Wales Evidence Act* is due out in March). Thirdly, *Uniform Evidence Law* is a little bit cheaper. This is, no doubt, because it is a good 150 pages shorter. The difference in length is mainly due to the fact that the *Annotated Commonwealth Evidence Act* reprints a flotilla of legislation omitted from *Uniform Evidence Law*, including the *Acts Interpretation Act 1901*, the Foreign Evidence (Foreign Material — Criminal and Related Civil Proceedings) Regulations and the International Covenant on Civil and Political Rights. Whether or not all this additional legislation is necessary will no doubt depend on the individual reader; but in my view the additional legislation is the sole advantage that the *Annotated Commonwealth Evidence Act* has over *Uniform Evidence Law*. Finally, *Uniform Evidence Law* has a much more attractive cover. The best choice? *Uniform Evidence Law* by a mile.

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