Submission to the Independent Review of the *Public Interest Disclosure Act 2012*

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1. I make this submission in response to an invitation by the Review Secretariat.

2. In my opinion, the objects of the *Public Interest Review Act* (PID Act) are adequately stated and the overall approach taken to public interest disclosures is generally sound. However, I would like to raise some issues concerning several sections of the Act.

What is a public interest disclosure

3. The scope of public interest disclosure is defined by subsection 7(1) of the Act which provides that:

> *(1) For this Act, a public interest disclosure—*
>
> *(a) is a disclosure of information by a person about disclosable conduct that—*
>
> > *(i) the person honestly believes on reasonable grounds tends to show disclosable conduct; or*
> >
> > *(ii) tends to show disclosable conduct regardless of whether the person honestly believes on reasonable grounds the information tends to show the conduct; and*
>
> *(b) includes any assistance given by the discloser during an investigation of the information mentioned in paragraph (a).*

4. To invoke the provision contained in paragraph (a), a discloser would need to establish, not only that he or she had an honest belief that disclosable conduct had actually occurred, but also that there were reasonable grounds for that belief. The provision contained in paragraph (b) relieves the discloser of that obligation, but it applies only if the disclosed information "tends to show" disclosable conduct. The meaning of this phrase may not be entirely clear. In explaining the words in "shows or tends to show" in the NSW counterpart of the PID Act, the Ombudsman has said:

> *This means there must be sufficient information to indicate that the wrongdoing has happened or is happening. This may include:*
> *• direct observation of the wrongdoing*
> *• corroborative observation by others*
> *• evidence such as unbalanced accounts, missing items of value or contradictory records.*
>
> *There should be no alternative explanations for the conduct or activities observed that can be easily thought of.*
>
> *Taken together, an 'honest belief on reasonable grounds that information shows or tends to show' means that a PID cannot be based on a mere allegation or suspicion that is unsupported by any facts, circumstances or evidence.*
> *The person assessing the report may need to seek further information or conduct preliminary inquiries before deciding whether a report meets this criteria. They might examine any source documentation and perhaps talk with the internal reporter.*

However, it is not necessary for the internal reporter to provide sufficient information to conclusively establish or prove that the wrongdoing occurred to any investigative standard of proof[1]

5. Whilst it may be desirable to exclude reports of mere speculation or wholly unfounded suspicion from the scope of the Act PID Act, I think that a more expansive approach should be taken than that reflected in the Ombudsman's explanation. In my opinion, a discloser should not have to have sufficient information to indicate that the wrongdoing has happened or is happening. It should not be necessary for him or her to conclude that there are no alternative explanations for the conduct or activities observed that can be easily thought of. Nor, in my opinion, should a potential discloser be encouraged to embark upon his or her own enquiries. On the contrary, I think a discloser should be free to disclose any information that provides reasonable grounds for suspicion that some disclosable conduct might have occurred or might occur in the future. Any decision about whether the information is sufficiently cogent to warrant investigation should be made by the person to whom the disclosure is made.

6. It should also be clear that the information need suggest any specific act or omission. Someone who notices that an officer dealing with public funds or tenders for government contracts has suddenly began to adopt a financially extravagant lifestyle should feel to disclose his or her suspicion that it might reflect some some dishonesty in the performance of the officer's duty. It should not be necessary for the discloser to attempt to discover whether the officer may have misappropriated government funds or taken bribes.

What is not a public interest disclosure

7. Subsection 7(2) provides, inter alia, that a *public interest disclosure* does not include a disclosure of information by a person "that relates entirely or in substance to a disagreement in relation to a policy about amounts, purposes or priorities of public expenditure." That provision may generally be appropriate, but in my opinion it should be subject to an exception where a discloser believes on reasonable grounds that a decision made by an entity other than the Legislative Assembly is likely to give rise to a substantial and specific danger to public health or safety. Medical practitioners who believe on reasonable grounds that a decision to defund crucial health facilities should be free to raise the relevant issues without fear of reprisals.

To whom may disclosures be made

8. Section 15 (1) provides that a disclosure may be made to:

(a) a disclosure officer; or

(b) a Minister; or

(c) if the discloser is a public official for a public sector entity—

(i) a person who, directly or indirectly, supervises or manages the discloser; or

(ii) for a public sector entity that has a governing board—a member of the board; or

(iii) a public official of the entity who has the function of receiving information of the kind being disclosed or taking action in relation to that kind of information.

[1] http://alc.org.au/media/76759/b_%20b2-what_should_be_reported_nov11.pdf

9. The term, "disclosure officer" is defined by section 13 to mean:

(a) for a disclosure that relates to an ACTPS entity—

(i) the commissioner; or

(ii) the head of service; or

(iii)the auditor-general; or (iv) the ombudsman; or

(v) the head of an ACTPS entity; or (vi) a person declared under subsection (2) for an ACTPS entity;

(b) for a disclosure that relates to a Legislative Assembly entity—

(i) the clerk of the Legislative Assembly; or

(ii) the auditor-general; or

(iii)the ombudsman; or

(iv) a person declared under subsection (2) for a Legislative Assembly entity.

10. Whilst these provisions are generally appropriate, I think that a person who believes on reasonable grounds that information that tends to show conduct that may involve a criminal offence should be entitled make a protected disclosure to a police officer or to the Integrity Commissioner. Section 21 does require an investigating entity to refer a disclosure to the chief police officer if satisfied on reasonable grounds that the relevant disclosable conduct could involve an offence, but the need for the entity to be satisfied of reasonable grounds for referral suggests that this is a step that should be taken only after at least some investigation by a departmental officer. Police have investigative powers not available to the investigating entities currently recognised by the Act and an antecedent investigation, even if intended only to ensure that there are reasonable grounds for referral, might cause undue undue delay and otherwise prove counter-productive. For example, an officer suspected of fraud might respond to a departmental investigation by disposing of evidence, falsifying records or transferring funds overseas. I recommend that section 15 be amended by adding "a police officer" and "the Integrity Commissioner" to the list of persons to whom a disclosure may be made.

11. I also recommend the Act be amended to address the issues raised by Mr Duncan, the Clerk of the Legislative Assembly. Section 11 of the Act provides that disclosures to about Members of the Assembly, their staff or the Clerk may be made to the auditor-general or the ombudsman. There is no need for the Clerk to conduct investigations into information so disclosed. Complaints about Members of the Assembly may be made to the Commissioner for Standards. I support Mr Duncan's recommendation that the Integrity Commissioner should be empowered to investigate such disclosures. However, in my opinion, the Integrity Commissioner should also have a discretion to decline to investigate for reasons such a those set out in section 20 or to refer the disclosure to the Commissioner for Standards or an investigating entity if satisfied that this would be appropriate.

Public sector entity must take action

12. Subsection 24(1) provides that;

If a head of a public sector entity believes on reasonable grounds that disclosable conduct has occurred, is likely to have occurred or is likely to occur, the entity must take action necessary and reasonable to—

(a) prevent the disclosable conduct continuing or occurring in the future; and

(b) if the investigation of the public interest disclosure has been completed—discipline any person responsible for the disclosable conduct.

13. The meaning of the word "likely" has been discussed in numerous cases and, it seems, may vary according to the context in which it is used. To avoid any doubt about the application of this subsection to the risk of future misconduct, I recommend that it be amended to make it clear that whenever the head of the entity believes on reasonable grounds that there is a substantial risk of such conduct occurring in the future, the entity must take any action that is reasonable in the circumstance to prevent such conduct from occurring.

Limitations on obligations to keep people informed

14. Section 26 (1) of the Act provides, that

A person, including a discloser, need not be told about information in relation to a public interest disclosure if telling the person would be likely to adversely affect—

- *(a) a person's safety; or*
- *(b) an investigation relating to the disclosure*.

15. I recommend that this section be amended so that the ground for non-disclosure include the risk of adverse effects on investigations by police or the Integrity Commissioner.

When disclosure may be made to Legislative Assembly or journalist

16. Section 27 of the Act provides, inter alia, that:

(1) This section applies if a discloser has made a public interest disclosure to a person mentioned in section 15 and—

(a) an investigating entity has refused or failed to investigate the disclosure; or

(b) the discloser has not been told within 3 months after the day the disclosure is made whether or not the disclosure will be investigated or dealt with; or

(c) the discloser has been told the disclosure will be investigated but has not been told about the progress of the investigation for a period of more than 3 months; or

(d) the following applies:

(i) the disclosure has been investigated;

(ii) there is clear evidence that 1 or more instances of disclosable conduct mentioned in the disclosure has occurred, or was likely to have occurred;

(iii) the discloser has been told by the investigating entity that no action will be taken in relation to the disclosable conduct.

(2) This section also applies if a person honestly believes on reasonable grounds that—

(a) the person has information that tends to show disclosable conduct; and

(b) there is a significant risk of detrimental action to the person or someone else if a disclosure is made to a person mentioned in section 15; and

(c) it would be unreasonable in all the circumstances for the person to make a disclosure to a person mentioned in section 15.

(3) The person may make a disclosure of information about the disclosable conduct to—

(a) a member of the Legislative Assembly; or

(b) a journalist.

(4) In making a disclosure under this section, the person—

(a) must disclose sufficient information to show that the conduct is disclosable conduct, but not more than is reasonably necessary to show that the conduct is disclosable conduct; and

(b) if a public interest disclosure was made to a person mentioned in section 15—may inform the member of the Legislative Assembly or journalist about the progress and outcome of any investigation.

17. This is an interesting provision, the purpose of which was revealed in the explanatory memorandum:

It is not unusual for matters to come to the attention of the media, nor is it revolutionary to suggest that a person could raise their concerns with their local member. However, the conditions under which a report to the Assembly or the media will be protected under the PID regime are necessarily strict.

In most cases, before a disclosure to the media is protected, a person must first have made a genuine attempt to have their case heard internally. Then if the investigating entity refuses or fails to investigate, or has not complied with the information requirements for the discloser, or finds disclosable conduct has occurred but declines to take action, the discloser is able to go to the media or the Assembly without losing legislative protection.

There is also one circumstance allowed under the Bill for a potential discloser to go direct to the media or a member of the Legislative Assembly without lodging their PID with one of the people listed under proposed section 15. This is in the rare situation where it would be unreasonable to require the person to try to go to a public sector entity to have the matter resolved, and there is a risk of detrimental action or harm to a person if the PID was to be lodged.

The intent of this section is to establish a mechanism through which a report about grand corruption can be made and protections afforded without the discloser being left in fear of

retaliation. A disclosure to the media or member should be seen as an avenue of last resort. The intent of the provision is to cover instances of significant corruption or maladministration so seriously embedded that there is no chance of the discloser receiving a fair hearing by either the entity responsible or the oversight agencies.

18. It may be noted that the same conditions must be met for disclosures to the Assembly or to a journalist. This may reflect a judgment that, as a matter of political reality, a disclosure to the Assembly is likely to lead to disclosure to the press, but it is not self-evident that the supply of information to a duly elected Legislative Assembly should be limited in the manner required by this section. Whilst the Act is clearly directed towards disclosures made at the initiative of 'whistleblowers', its terms seem to cover disclosures may be made in response to questions asked by by others, including Members of the Assembly. Should they have no greater access to departmental officers than journalists? There is presumably an established protocol concerning contacts between Members and government agencies, but I recommend that this issue be referred to the Standing Committee on Administration and Procedure for further consideration.

19. The section also fails to offer adequate protection for a potential discloser when he or she believes on reasonable grounds that there is a need for urgency in the disclosure of information to the Assembly or the media. The requirements of subsection (1) are unlikely to be satisfied quickly unless an investigating entity immediately refuses to embark upon an investigation. The grounds in subsection (2) may permit urgent public disclosure, but only if there is a significant risk of detrimental action to the person or someone else if a disclosure is made to a person mentioned in section 15 and it would be unreasonable for the person to make such a disclosure. As the explanatory memorandum makes clear, this provision was intended to apply in rare situations when there is a risk of detrimental action or harm to a person if the PID were to be lodged with such a person. It does not address the the problem that may arise if someone proceeds to make a report in the usual way but the issues he or she have raised are not addressed with the urgency required. In some circumstances, there may be a real risk of harm if the public is not alerted to some danger by timely disclosure. It was presumably assumed that any risk of this kind would be successfully assuaged by disclosure to a person falling into one of the categories specified in section 15 because any such person could be trusted to respond with due urgency, but this may have been an unduly robust assumption. Such a risk could be left unaddressed for up to three months whilst to the person to whom the disclosure is made decides whether to investigate the issues raised and, if so, during a further period during which the investigation is undertaken.

20. Whilst that may often be a perhaps regrettable but nonetheless appropriate response to the issues raised, there may be circumstances in which a discloser may reasonably find such a delay intolerable. Disclosable conduct includes any action of a public sector entity or public official for a public sector entity that is "a substantial and specific danger to public health or safety." A medical practitioner who believes on reasonable grounds that some existing practice is giving rise to such a danger may disclose the relevant information to a public official on a clinical standards committee for a public hospital (see example 3 cited in section 15) or some other disclosure officer but remain frustrated by inaction or unacceptable delay. In such an event, the practitioner should be free to inform the Assembly or the press of any such danger to public health or safety whenever it becomes clear that timely action will not be taken or immediate action is otherwise warranted. Such an approach might give rise to

differences of medical opinion being publicly debated, but that may be unavoidable if unnecessary dangers are to be avoided.[2]

21. There may be other circumstances that might also justify immediate public disclosure, such as information suggesting that a contract about to be executed has been procured by fraudulent misrepresentation or that a Bill about to be passed is likely to permit substantial damage to the environment.

22. Furthermore, even when the scope of any disclosure permitted by this section is limited by the requirements in subsection (4) which seem unduly restrictive. It is difficult to see how anyone could comply with the requirement to disclose "not more than is reasonably necessary to show that the conduct is disclosable conduct" and still provide a sufficient account of the facts and an adequate explanation of the relevant issues. Indeed, subsection (4) could be taken to preclude disclosures extending beyond single sentences revealing, for example, that an officer received a bribe or stole some money. The inclusion of sufficient facts and explanation to excite public interest and concern would otherwise seem to be excluded. Information likely to identify a person said to have failed in his or her duty should be withheld unless reasonably necessary to a comprehensible account of the relevant facts and circumstances, but a discloser able to invoke this section should be permitted to explain the relevant facts and the reason for his or her concern.

23. On the other hand, circumstances that warrant a disclosure to a disclosure officer may not warrant disclosure to a journalist even when an investigation has been refused or delayed. Whilst the disclosure of a substantial dangers to public health or safety or to the environment may well be in the public interest, there may be no justification for the disclosure of conduct warranting disciplinary action but involving no criminality or risk to the public.

24. I recommend that some further consideration be given to defining the nature of information that may be publicly disclosed and the circumstances in which such disclosures may be made.

The rights of others

25. The objects of the Act include ensuring that appropriate consideration is given to the interests of people who are the subject of disclosures, but more consideration could perhaps be given to protecting unwarranted damage to reputations and careers. Public servants enjoy certain statutory protections such as the rights to apply for a review of an adverse decision or to appeal, provided by sections 224 and 225 of the *Public Sector Management Act 1994* and there are established procedures intended to ensure that officers accused of misconduct are treated fairly. However, others, such as private contractors, who may be accused of complicity and whose livelihoods may be affected by adverse decisions, are not be similarly protected. Allegations may be made in the form of disclosures under the Act by business competitors or others actuated by bias. Yet the individual or company against whom they have been made may not even be informed of the relevant disclosures and be unable to correct them

26. I recommend that the Act be amended to incorporate a requirement that anyone who may be adversely affected by a decision taken in response to a disclosure should be given a reasonable opportunity to respond to the imputations against them unless this would:

[2] The need for due protection of medical practitioners can be illustrated by reference to deep sleep therapy which persisted in NSW for many years despite widespread concern within the medical profession and was ultimately found to have led to the deaths of numerous patients. See *Report of the Royal Commission into Deep Sleep Therapy*. The Honourable Mr Acting Justice J.P. Slattery, Royal Commissioner.

- be likely to adversely affect -

    (a) a person's safety; or

    (b) an investigation relating to the disclosure

    (c) an investigation conducted by the police or the Integrity Commission;

- identify a person that has given information in relation to the disclosure or create permitting the his or her identity to be deduced; or

- otherwise be contrary to law.

27. Allegations of financial impropriety or other misconduct may cause personal distress and substantial loss. In other circumstances, people may seek to establish the falsity of an allegation or imputation and obtain damages by actions for defamation. However, the nature of the protection offered to those who suffer unjustly as a result of disclosures varies according to whether the loss was caused by the action of the discloser or by those of an official acting in response to it.

28. Section 36 provides that "in a proceeding for defamation, a discloser has a defence of absolute privilege for publishing the information disclosed". An aggrieved plaintiff can overcome this defence only if he or she can establish that the discloser knew that the information disclosed was false or misleading or that the disclosure was vexatious (see section 37) and, even then, a discloser may escape liability by invoking subsection (3) which provides that:

    However, a court may make an order that subsection (2) does not apply if the court considers that the discloser's conduct mentioned in subsection (1) (a)—

    (a) has not materially prejudiced the investigation of the public interest disclosure; and

    (b) is of a minor nature.

29. These provisions extend far beyond the defence of qualified privilege that would otherwise be available to disclosers, in that it shields them from liability in relation to disclosures made negligently, irresponsibly or even attended by dishonesty. It is difficult to understand why someone who has garnished an otherwise valid disclosure with knowingly false statements should be wholly relieved of liability for them or, more importantly, why anyone should be denied a remedy for any loss as a consequence of lies. There is no obvious reason to regard a finding that the false statements have not prejudiced a public service investigation as relevant to an action for defamation brought by someone whose reputation has been damaged by them. A lie may be very damaging even if conveyed in an almost wholly irrelevant aside. The criterion that the relevant misconduct be of a "minor nature" is also problematic. Is it intended to mean that the dishonest or vexatious aspects of the conduct had only a minor effect on the investigation? That would again seem to be irrelevant to an action for defamation. Is it intended to mean a defamation having only a relatively minor effect upon the plaintiff's reputation? If so, that should be reflected in the quantum of damages awarded, not in a judicial decision to retrospectively impose a barrier to the plaintiff's claim.

30. Section 37 is also somewhat discordant with the provision in section 7 that a public interest disclosure does not include a disclosure of information by a person that the person knows is

false or misleading. If such statements are not public interest statements, there is no obvious reason for the Act to provide any protection for them.

31. A different approach has been taken to the potential liability of those charged with investigating or otherwise responding to disclosures. Section 43 provides that:

> *(1) An official is not civilly liable for anything done or omitted to be done honestly and without recklessness—*
>
> *(a) in the exercise of a function under this Act; or*
>
> *(b) in the reasonable belief that the act or omission was in the exercise of a function under this Act.*
>
> *(2) Any civil liability that would, apart from subsection (1), attach to an official attaches instead to the Territory.*
>
> *(3) In this section:* ***official*** *means—*
>
> (a) *the commissioner; or*
>
> (b) *the ombudsman; or*
>
> (c) *a disclosure officer; or*
>
> (d) *an investigating entity; or*
>
> (e) *a person authorised under this Act to do or not to do a thing.*

32. A person seeking redress under this section would obviously have to establish some cause of action based upon the conduct of 'an official' and, whilst section 14 permits any person to make a public interest disclosure, it seems unlikely that a discloser would be held to fall within the description in paragraph 43(3)(e) even if employed by the ACT Public Service. Subsection (3) would presumably be construed *ejusdem generis* and in the context of section 36 which specifically addresses actions against disclosers which would be irrelevant if they were intended to be covered by the provisions of section 43. Furthermore, since section 14 provides that any person may make a public interest disclosure it is difficult to see how the term 'official' could be construed to embrace contractors or other people who may have relevant information but are not employed by a government agency.

33. Liability on the part of the Territory might not be established if an official acted in good faith upon statements made by a discloser that later proved to be false.

34. There is also some inconsistency between the tests adopted in section 36 and 43. The protection provided by section 36 applies unless the discloser knows that the information is false or misleading or it is vexatious, whilst the protection provided by section 43 applies unless the official acts dishonestly or recklessly.

35. More fundamentally, a person denied a remedy against an official by reason of this section may obtain that remedy against the Territory, whilst a person unable to sue for defamation by reason of section 36 will be effectively denied any remedy. The rights of a potential plaintiff may therefore depend substantially on whether his or her loss has been caused by the improper statement of one public servant or the improper response of another.

36. In my opinion, there should be a more consistent approach to the protection to people who suffer loss due to the disclosure of incorrect information. This could be achieved by a simple amendment making section 43 applicable to disclosers as well as official. There may be resistance to a provision that would transfer liability to the Territory from discloser not in government employment but, since the Act deals with disclosures in the public interest, that may not be an unreasonable approach. Alternatively, section 37 could be amended to provide that the protection offered by section 36 is forfeited if the disclosure is made dishonestly or recklessly.

37. In most cases, of course, an aggrieved person who is innocent of any wrongdoing will be vindicated by the ensuing investigation and suffer little, if any long term loss. Furthermore, if the allegation or imputation is communicated to a journalist and published, the aggrieved person may be able to sue the relevant media company for defamation. Nonetheless, there may well be cases in which a person who has suffered substantial harm as a result of an inaccurate disclosure may be effectively denied compensation or any effective means of vindicating of his or her reputation.

38. I recommend that section 36 be repealed and that section 43 be amended by deleting the words "an official" is subsections (1) and (2) and replacing them in each subsection with the words (a discloser or an official). Alternatively, section 37 should be amended to provide that the protection provided by section 36 is forfeited in respect of any part of the disclosure that is made dishonestly or vexatiously.

The right to withhold information from courts

39. Subsection 44 (5) provides that:

> *A person to whom this section applies need not divulge protected information to a court, or produce a document containing protected information to a court, unless it is necessary to do so for this Act or another law in force in the ACT.*

40. The intended scope of the exception is unclear. No guidance is provided by the explanatory memorandum, which does not refer to this particular subsection. On one possible construction, the provision merely affirms that a person to whom the section applies may withhold information from a court unless legally required to provide it. The obvious problem with such a construction is that it would attribute to the subsection nothing more than a self-evident truism.

41. On another possible construction, the exception would apply only when the need for disclosure arises directly from a law itself,[3] rather than from an order made under legal authority. On that construction, the subsection would effectively create a privilege enabling a person to whom the section applies to refuse to disclose information even in response to a subpoena or other court order. It is difficult to see any adequate justification for such a provision. The rights thereby created may have been seen as analogous to legal professional privilege, but it is well established that that privilege is justified by the public interest in the administration of justice.[4] Furthermore, legal professional privilege is a right of the client,

[3] For an example of such a law see section 356 of the *Children and Young People Act 2008 which* requires people in certain occupations to report any grounds for belief that a child has been sexually abused or suffered non-accidental injury.

[4] In *Grant v. Downs* (1976) 135 C.L.R. 674, at p. 685, Stephen, Mason and Murphy JJ. said: "The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal

not that of the lawyer. Section 44 would not appear to serve any comparable public interest and it seems to permit officials to decide for themselves whether to resist compliance with a subpoena. The only comparable privilege is that relating to religious confessions[5] and that applies only to confessions made to a member of the clergy in the member's professional capacity according to the ritual of the church or denomination.

42. Blanket rules that may have the effect of excluding potentially crucial evidence from courts always give rise to some risk of miscarriages of justice. It is rarely, if ever, possible for those drafting or propounding such rules to anticipate all of the circumstances that might conceivably arise in civil or criminal litigation perhaps many years in the future. Whilst senior officials usually act responsibly, the potential importance of information may be known only to those involved in the case and it may not always be appropriate for some aspects of the proceedings to be disclosed. In appropriate cases, courts may relieve potential witnesses from compliance with a subpoena on the ground of public interest immunity, but such cases are comparatively rare. Neither a person facing trial for defrauding the Territory n nor a coroner enquiring into the death of an ACT employee should have to wonder whether potentially exculpatory material has been withheld due to departmental policy or an official's failure to understand its relevance.

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advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available." This passage has been cited in subsequent decisions of the High Court of Australia including *Waterford v Commonwealth* [1987] HCA 25.

[5] See, for example, section 127 of the *Evidence Act 1995* (Cwth).