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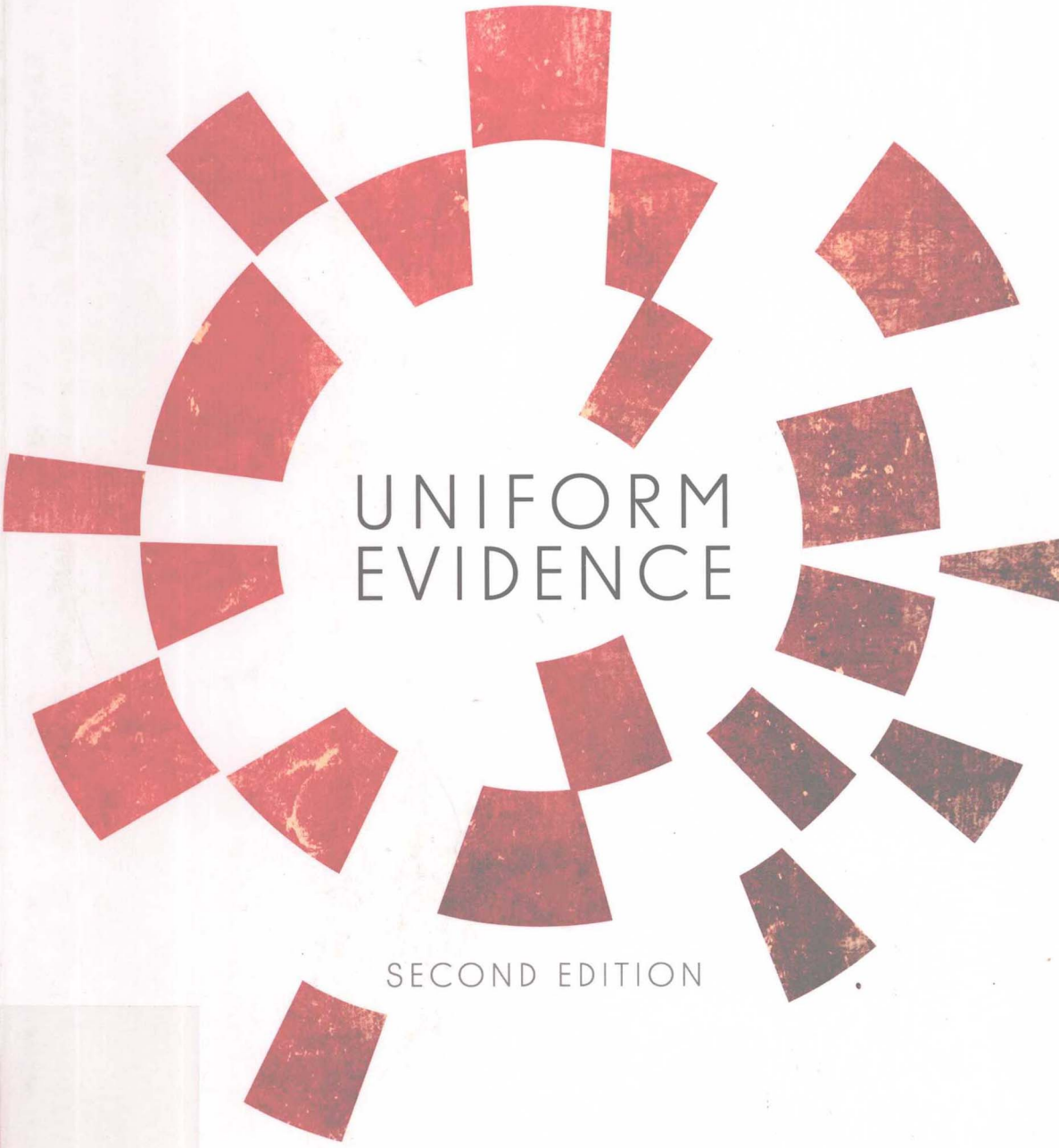

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SECOND EDITION

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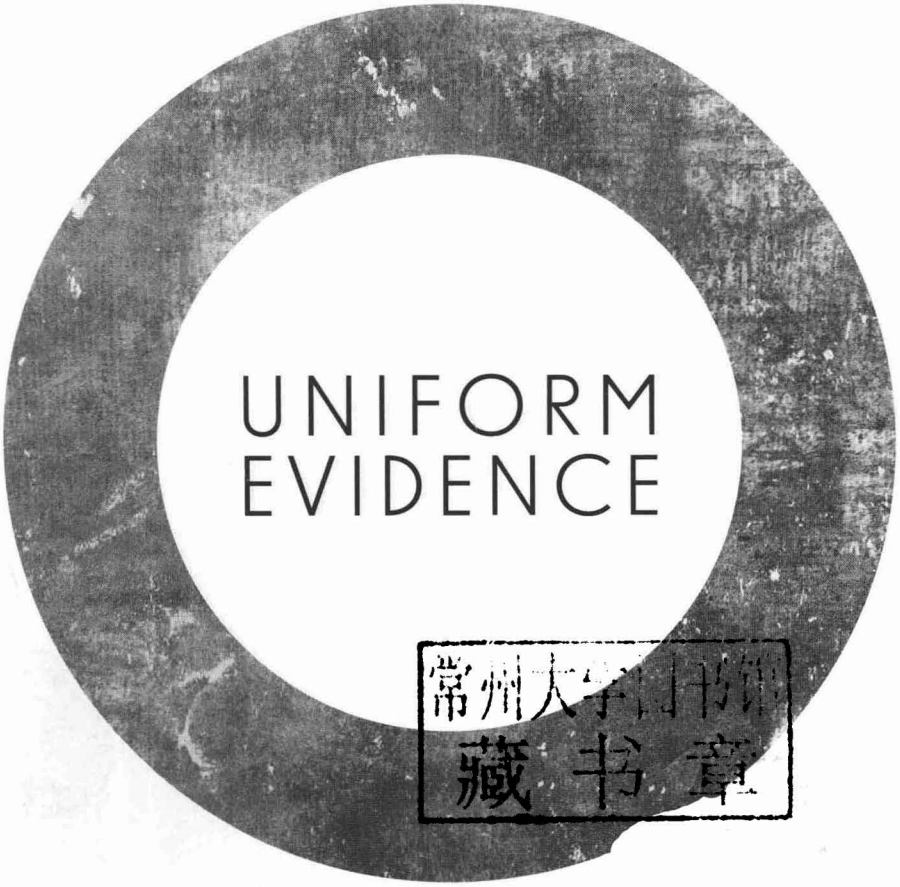

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PREFACE

As we finalised the proofs of this text, Victoria's Court of Appeal released its judgment in *Haddara v The Queen* [2014] VSCA 100. Waleed Haddara, his jury found, had fired six shots from his car into another, oblivious that the other car's driver was his cousin (rather than a family rival). Haddara was also unaware that his own driver (who despised Haddara for introducing him to methamphetamines) was taping the whole incident on his phone. The appeal court ruled that the jury could use a recording of innocuous comments that the mentally impaired suspect made during an otherwise 'no comment' police interview in order to identify the offender's voice on the driver's tape.

Haddara was the 171st published judgment of Victoria's appeal court that mentions that state's *Evidence Act 2008*. At the same point in time, there had been over 1200 appellate mentions of the uniform evidence law in New South Wales, over 230 in the federal courts, over 100 in the High Court, over 70 and 30 respectively in Tasmania and the Australian Capital Territory, a handful in the Northern Territory and one from Norfolk Island. In a paper published last year, retired High Court judge Dyson Heydon pronounced the sheer volume of decisions on the uniform evidence law (particularly in NSW) a worrying sign:[1]

> They do not seem to betoken merely necessary but transitory birth pangs while a better world is being born. They point to a chronic and continuing problem.

We disagree (and not just because Mr Heydon attempts neither an investigation of the voluminous case law nor a comparison with decisions on the previous common law). Having the law of evidence regularly featured in the nation's peak courts—rather than banished to unexamined lower court rulings or locked away in a dusty treatise—is the 'better world' that we hoped would follow the enactment of the uniform evidence law.

In recognition of this vibrant and increasingly mature jurisprudence, we have opted in this new edition of our text to increase our use of case examples in our discussion of the principles behind the law. For example, we bid a fond farewell to the golfer practicing her swing in a vandalism-prone neighbourhood, who helped us to illustrate the nature of tendency and coincidence reasoning in Part 3.6 of the statutes, in favour of a fully-worked treatment of a poker machine counterfeiting dispute that reached the High Court last year in *Aristocrat Technologies Australia Pty Ltd v Global Gaming Supplies Pty Ltd; Aristocrat Technologies Australia Pty Ltd v Allam* [2013] HCA 21. With so many jurisdictions participating in the new regime, we can now track disagreements between appellate courts on topics such as the meaning of 'probative value', or the admissibility of tendency evidence in sexual offence proceedings, important splits between the judiciaries of the nation's two most populous states that were seemingly swept under the common law carpet. We are also pleased that even jurisdictions with relatively modest citations of the statutes have contributed important readings of the legislation, and that all have yielded evocative facts like those in *Haddara*.

That isn't, of course, to say that we agree with the outcomes of all the judgments we discuss, much less the reasoning underlying them. To take *Haddara* as an example, a majority of the Court of Appeal held that the dispute about the use of Haddara's police interview to identify the voice on the driver's tape was governed, not by Part 3.4 of the legislation on admissions, but rather by the common law. Justices Weinberg and Redlich relied on arguments Mr Heydon had proposed in his paper mentioned above to conclude that all common law exclusionary rules continue to apply under the uniform evidence law unless the new statutes set out a replacement rule on the

1 J Heydon, 'The non-uniformity of the "uniform" Evidence Acts and their effect on the general law' (2013) 2 *Journal of Civil Law and Procedure* 169, 171.

same 'specific area'. While it might seem that preserving old common law rules is more protective of the justice system (and criminal defendants in particular), we consider that this stance carries considerable costs.

One is the risk that the lingering fall-back to common law rules may prompt courts to refrain from giving full force to important protections in the uniform evidence legislation. For example, in *Haddara*, the Court's contemplation of the survival of the common law's 'fairness' discretion only arose because the Court ruled that similar discretion in section 90 was inapplicable. It made that ruling on the improbable basis that nothing Haddara said to the police during his interview (including his full responses to questions about his whereabouts and business practices) was a 'representation'. This apparent instance of reading down the clear words of the legislation, by reference to notions from the previous law, narrows the scope of all the protective rules in Part 3.4, including protections that have no analogue in the common law.

A second, quite different cost is that, if significant parts of the common law's exclusionary rules now potentially coexist with the uniform evidence legislation, then this means that all courts at all levels in the seven adopting jurisdictions must simultaneously keep track of and apply two systems of evidence law in every trial, an approach that risks confusion below and successful appeals above. Our view is that, just as the decisions of the legislatures of Queensland, South Australia and Western Australia not to adopt the new system should be accorded respect,[2] so too should the decisions of Australia's other seven legislatures to depart from the common law.

The Victorian Court of Appeal's stance is especially surprising in light of significant movements by that court to rectify the greatest current flaw in the uniform evidence law: the simultaneous application of statutory and common law regimes on mandatory jury directions. As we (in past editions of this text) and countless others have argued, the High Court's common law jurisprudence on mandatory jury directions, while superficially protective of criminal defendants, was at best a substantial burden for jurors, trial judges and appeal courts alike and at worst a significant intrusion into the adversarial system and the independence of the jury. To this end, Victorian judges have been keenly involved in the movement to abolish the common law on jury directions (left in place by section 165(5) of the uniform law) and to replace it with a consolidated statute that simplifies the required directions and restores the adversarial process.[3]

Regrettably, this widely supported law reform has fallen victim to the chaos of Victoria's minority government. While a rump *Jury Directions Act 2013* was enacted, the more significant reforms in a proposed amendment bill were defeated in April 2014 during a wrangle about parliamentary procedure. Although the dispute had nothing to do with the merits of the legislation, the fate of an identical bill before one house remains uncertain, with the current Parliament's own future now in some doubt. With our publisher's indulgence, we have nevertheless retained references throughout the text to the 'proposed Jury Directions Amendment Bill 2014', in the hope that the bill will eventually become law, if not this year, then during the next government. We have done this in part because we consider the reforms so sound and necessary that we anticipate that they will inevitably be adopted in other Australian jurisdictions.

As in the previous edition, Jeremy took primary responsibility for Chapters 1, 5–10, 12, 13 and 19, while Andrew took primary responsibility for Chapters 2–5, 11, 14–18 and 20. Jeremy thanks Melbourne Law School for granting him sabbatical to work on this edition, while Andrew thanks his research assistants, Nicholas Boyd-Caine and the wonderful and irreplaceable Cate Read. We both appreciate the support of the editorial team at Oxford University Press and the patience of our beloved partners, Denise van Dijk and Madeleine Fogarty.

Jeremy Gans and Andrew Palmer, September 2014

2 *Baker v The Queen* [2012] HCA 27, [114] (Heydon J).

3 M Weinberg, *Report from the Honourable Justice Mark Weinberg on Jury Directions*, Supreme Court of Victoria (2012).

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