



Examiner's Comments

11 EVIDENCE

September 2025 Examinations

The exam comprised of two questions. Candidates were required to answer both questions. Both questions were of equal value (40 marks each).

Question 1

Question 1 was a civil case and was designed to test the application of evidence principles applicable in civil matters, including: relevance; the rule against hearsay and the hearsay exceptions; illegally obtained evidence; tendering documentary evidence; client legal privilege and waiver; opinion evidence and the principles relating to the exception for specialised knowledge; and the rules in *Browne v Dunn* and *Jones v Dunkel*.

Question 2

Question 2 was a criminal case and focused on the rule against hearsay, and differentiating between first and second-hand hearsay; lay opinions, identification evidence; credibility evidence and evidence relating to the character of the accused; admission of prior inconsistent statements; and tendency evidence.

Characteristics of poor or average responses

Poor or average responses failed to identify key issues and/or misapplied the basic principles. For example: for the purpose of the rule against hearsay, when to apply certain exceptions; or whether hearsay is first or second-hand. They also failed to accurately assess the various paths to adducing prior inconsistent statements.

More fundamentally, some answers also failed to provide sufficient analysis of the problem, merely identifying the issues and perhaps the relevant sections of the *Evidence Act 1995* (NSW), but without assessing the applicability of the relevant section to the facts. It was not rare for an answer to suggest that an issue “should be assessed” by the fictional court in the problem, without the student engaging in that assessment. Moreover, many answers failed to sufficiently identify and apply the relevant case law, relying only on the provisions of the legislation.

Characteristics of very good or excellent responses

The excellent responses and very good responses effectively identified most of the relevant issues, applied the relevant section and/or case law accurately, and provided a cogent analysis of the legal issues raised by the facts. The best answers provided a deeper understanding of the issues and application of the principles relating to hearsay (for example,

when is a purpose not a hearsay purpose, or when is hearsay second-hand) and the opinion rule (when does the basis rule apply and is there a test of evidentiary reliability in s 79).

Common mistakes

As discussed above, common mistakes included: not understanding when a representation is or is not adduced for a hearsay purpose – answers identified that there was a previous representation, and then assumed that it was being adduced for a hearsay purpose. And few answers identified the difference between first and second-hand hearsay. Other common mistakes included simply ignoring significant issues, failing to recognise the use of s 81 as an exception to the hearsay rule, and misunderstanding the application of the principles that apply to the tender of copies of documents.

Time management was also an issue for some students, but perhaps fewer than last semester.

Areas for improvement

Areas of improvement should focus on the matters discussed above, and also by developing a clear understanding that application of the law to the facts is essential in a good answer. This would likely be enhanced by further practice of issue identification and analysis.

Results

On the whole, the results were an improvement upon last semester. And whilst this appears to be partially due to students being better able to identify the key issues in the exam, it also appears to be largely due to a much higher average assignment mark than in previous semesters.