

Chapter 11

Updating Beliefs: Rethinking the Regulation of Identification Evidence Under the UEL

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I. Introduction: Conventional Wisdom and Blind Spots

[T]he seductive effect of identification evidence has so frequently led to proven miscarriages of justice that courts of criminal appeal and ultimate appellate courts have felt obliged to lay down special rules in relation to the directions which judges must give in criminal trials where identification is a significant issue.¹

Despite a proliferation of types and techniques of identification, including the increasing availability of images and other recordings in the courtroom, *eyewitness* identification remains, in many respects, the archetypic form of identification evidence. The visual identification of the defendant, by a witness present at a relevant event, is the only form of identification evidence to be regulated specifically, and in any detail, under the UEL.² Australian and other common law courts profess an acute awareness of the frailties of such conventional eyewitness identification evidence, and it is generally accepted that, at the very least, such evidence will require emphatic and clear warnings to the fact-finder highlighting the dangers associated with relying on the evidence of a witness who may be honest, confident and wrong. However, as can be seen in number of recent Australian cases, this awareness does not seem to have been extended to the

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1 *Domican v The Queen* [1991]-[1992] 173 CLR 555, 561.

2 Part 3.9 of the UEL regulates Identification Evidence, defined as, '(a) an assertion by a person to the effect that a defendant was, or resembles (visually, aurally or otherwise) a person who was, present at or near a place where: (i) the offence for which the defendant is being prosecuted was committed; or (ii) an act connected to that offence was done; at or about the time at which the offence was committed or the act was done, being an assertion that is based wholly or partly on what the person making the assertion saw, heard or otherwise perceived at that place and time; or (b) a report (whether oral or in writing) of such an assertion'. Section 114 regulates 'visual identification evidence' and s 115 applies to 'photographic identification evidence'. There are some differences between jurisdictions, notably the Tasmanian *Evidence Act* omits ss 114 and 115 and warnings in Victoria are governed by the *Jury Directions Act 2015* (Vic).

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