HEARSAY AND RELATED EVIDENCE - A NEW ERA?

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I. INTRODUCTION

This paper deals with the provisions of the *Evidence Act* 1995 (Cth) ("the Act") relating to hearsay evidence and other evidence to which hearsay is relevant, such as opinion and expert evidence.[1] Given the extent of the statutory provisions in the Act, the paper can provide no more than an overview of the topic. However, due to the importance of survey or market research evidence in modern litigation, specific attention is given to the application of the Act to such evidence.

The Act commenced operation on 18 April 1995, almost thirty years after the first reference to the New South Wales Law Reform Commission by the late Honourable Sir Kenneth McCaw QC MLA on 26 June 1966. The rule against hearsay was the subject of a separate report by the New South Wales Law Reform Commission in 1978.[2] It recommended that an exclusionary rule of hearsay evidence be retained, but that the exceptions to the rule be reformed or modified. One proposed reform was for the admissibility of first hand hearsay.

The Commonwealth Government took up the impetus for reform in 1979 with the then Attorney-General's reference to the Australian Law Reform Commission ("ALRC"). The ALRC reported in 1987. It proposed that:

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1 *The Evidence Act* (NSW) 1995 (due to commence operation on 1 September 1995) contains identical provisions as to hearsay.

2 NSWLRC, Report No 29, *Report on the Rule Against Hearsay* (1978).

> There should be a comprehensive uniform law of evidence applying in proceedings in Federal and Territory Courts. It should reform existing law. It should not apply to appeals to Federal Courts from courts of a state or the Northern Territory, nor override specific Commonwealth or Territory Legislation such as the Competence and Compellability of Spouses Provisions in the Family Law Act 1975. Parliamentary privilege should be specifically preserved. Consequential amendments should be made to existing legislation.[3]

As to hearsay, the ALRC also recommended the retention of a general exclusionary rule. The policy basis for so doing was that:

- out of court statements are usually not on oath;
- there is usually an absence of testing by cross-examination;
- the evidence may not be the best evidence;
- there are dangers of inaccuracy in repetition;
- there is a risk of fabrication;
- to admit hearsay evidence can add to the time and cost of litigation; and
- to admit hearsay evidence can unfairly catch the opposing party by surprise.[4]

The ALRC further recommended that there be statutory exceptions to the rule. Many of the proposed exceptions derived from the common law. It also recommended significant changes to the existing law, including that first hand hearsay be admissible in civil and criminal proceedings. The ALRC reported that the policy objections to the admissibility of hearsay evidence could be dealt with appropriately by provisions relating to notice, discretions and waiver and by the fact that it was a matter for the court to determine the weight to be afforded to such evidence.

II. THE STATUTORY PROVISIONS

The hearsay provisions fall within Chapter 3 of the Act, which deals with the admissibility of evidence. Relevance remains the cornerstone of admissibility. Section 55(1) provides:

> The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.

This restates, in different language, Stephen's statement that evidence is relevant where

> any two facts...are so related to each other that according to the common course of events one either taken by itself or in conjunction with other facts proves or renders probable the past, present, or future existence or non-existence of the other.[5]

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3 ALRC, Report No 38, *Evidence* (1987).

4 *Ibid* p 72.

5 JF Stephen, *Digest of the Law of Evidence*, Macmillan (12th ed) Part 1.

III. HEARSAY

Part 3.2 deals with hearsay. The hearsay rule is contained in s 59 which provides:

> (1) Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation.
> (2) Such a fact is in this Part referred to as an asserted fact.[6]

The note to section 59 provides typical examples of hearsay evidence.[7] The section does not extend to unintentional implied assertions.[8]

Before turning to the individual provisions of Part 3.2, it is useful to refer to a number of recurring concepts in the provisions. Firstly, both 'representation' and 'previous representation' are defined terms. 'Representation' is defined in the Dictionary to include:

> (a) an express or implied representation (whether oral or in writing); or
> (b) a representation to be inferred from conduct; or
> (c) a representation not intended by its maker to be communicated to or seen by another person; or
> (d) a representation that for any reason is not communicated.

'Previous representation' means:

> ...a representation made otherwise than in the course of giving evidence in the proceeding in which evidence of the representation is sought to be adduced.

'First hand hearsay' is defined in s 62 to mean:

> ...a previous representation that was made by a person with personal knowledge of an asserted fact.

Personal knowledge, in turn, involves the notion of what a person "saw, heard or otherwise perceived".[9] The first two aspects of 'seeing' and 'hearing' do not require explanation. The reference to perception extends to an inference drawn from an observed act. So, a witness who observes a person give a nod of the head in response to a question would perceive a positive response.

The meaning of non-availability of witnesses, relevant for the first hand hearsay provisions,[10] is also governed by the Dictionary provisions. Part 2 cl 4 of the Dictionary provides that a person is not to be taken to be available to give evidence of a fact where the person is dead or incompetent (other than under s 16), where it would be unlawful to do so, where the giving of the evidence is prohibited by a provision of the Act and where all reasonable steps have been taken to find the person or secure the person's attendance or to compel the person to give evidence, without success.

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6 The hearsay rule is defined in the Dictionary to mean "subsection 59(1)".

7 The following example in the note to s 59 amply illustrates the scope of the hearsay rule:
D is the defendant in a sexual assault trial. W had made a statement to the police that X told W that X had seen D leave a night club with the victim shortly before the sexual assault is alleged to have occurred. Unless an exception to the hearsay rule applies, evidence of what X told W cannot be given at the trial.

8 *Pollitt v R* (1992) 174 CLR 558.

9 Personal knowledge is relevant to ss 62, 63, 64, 65, 69 and 82.

10 Sections 62, 63 and 65.

IV. EVIDENCE RELEVANT FOR A NON-HEARSAY PURPOSE

Section 60 provides:

> The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of the fact intended to be asserted by the representation.

The heading to s 60 describes this provision as an exception to the hearsay rule. This is not an accurate statement if the evidence is relied on solely for a non-hearsay purpose. In that case, it is admitted as original evidence.[11] However, s 60 makes a fundamental change to the common law. Evidence, once admitted as relevant for a non-hearsay purpose, becomes evidence of the fact asserted. The legislators vacillated in the various versions of the Evidence Bills as to whether this change should be implemented. The ALRC recommended the change because:

- permitting the use of evidence of a prior inconsistent statement to help determine the credibility of a witness, but not to prove the facts contained in the statement, had led to criticism from judges and virtually unintelligible directions to juries; and
- problems had arisen about the admissibility of an expert's evidence about the facts and opinions on which the expert had based his or her opinions.[12]

A witness' own previous representation falls within the exclusionary scope of s 59. However, it may be admissible as first hand hearsay. In addition, a witness' previous representation may be admitted as a prior consistent or inconsistent statement. Section 43, dealing with prior inconsistent statements does not, on its face, change the common law that such statements can only be used to attack the credit of the witness.[13] Likewise, the principle that prior consistent statements may be admissible to rebut a suggestion of recent fabrication remains.[14] However, pursuant to s 60, such evidence, once admitted, becomes evidence of the matter asserted.

Section 60 will have a significant impact on the use which can be made of various aspects of the evidence of experts. Under s 60 reported data of other experts and statements of fact forming the basis of the expert's accumulated knowledge or information commonly relied upon in a trade or calling may be admitted, with the effect that that evidence will thereby become evidence of those facts. It thus abrogates the decision in *Ramsay v Watson*, where the court rejected the evidence of an expert physician of the facts upon which he relied to form his opinion, there being no other evidence of those facts.[15] Now, if original evidence is not called, but evidence is admitted through an expert pursuant to s 60, the opposing party still has a number of options available. Firstly, the party could seek to have the court exclude the evidence under its discretionary powers in s 135.[16]

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11 *Subramaniam v Public Prosecutor* [1956] 1 WLR 965 at 969; *Cross on Evidence*, (Australian ed, 1991) vol 1, at [31010].

12 Senate Standing Committee on Legal and Constitutional Affairs, *Evidence Bill 1993 Interim Report* (1994) at [1.84].

13 *Hammer v S Hoffnung & Co Ltd* (1928) 28 SR (NSW) 280; *R v Askew* [1981] Crim LR 398.

14 *Nominal Defendant v Clements* (1960) 104 CLR 476. See ss 102 and 108.

15 (1961) 108 CLR 642.

16 Discussed in Part XII below.

Secondly, the principle in *Jones v Dunkel* might be invoked.[17] Thirdly, the court might be less inclined to give facts so admitted any or any significant weight if, in a case where the expert's source material is based upon what a person saw, felt or experienced, the person did not give evidence and was not exposed to cross-examination.

An interesting question arises as to whether s 60 is sufficiently encompassing to affect the decision in *Trade Practices Commission v Arnotts Limited [No 5]*, where the question arose whether expert evidence must expressly state the premises on which it is based.[18] The expert witness was examined in chief with respect to aspects of the applicants' case that had been presented to the court, either in the course of the opening or by the various documents filed in the matter, including the statement of claim. The evidence of the expert was objected to on the basis that the facts said to have been assumed by the expert in expressing his opinions were not identified, or at least were not sufficiently identified when he was examined in chief. Justice Beaumont, whose decision on this point was upheld by the Full Court of the Federal Court,[19] rejected the evidence, stating:

> ...authorities established that there is a rule of evidence at common law that, except in a straight forward, uncomplicated case, where the facts are admitted and readily identified, the opinion of an expert is admissible only where the premises, that is to say, the facts upon which his or her opinion is based, are expressly stated. It follows that, in a complex case, where facts are not readily identifiable, it is not permissible to put the whole of the transcript and documentary evidence to the witness en bloc.[20]

If s 60 were confined to first hand hearsay, Justice Beaumont's decision would continue to apply. However, the section is not so limited. It is arguable, therefore, that the material upon which an expert's opinion is based could be admitted under s 60 and be used as expert evidence, unless the evidence was excluded or limited by the court's discretion.

V. COMPETENCY - A PRECONDITION TO ADMISSIBILITY

Section 61(1) provides that any exception to the hearsay rule is dependant upon the competency of the witness giving the evidence.[21] By virtue of subsection (2), the section does not apply in respect of contemporaneous statements made as to the state of a person's health, feelings, sensations, intention, knowledge or state of mind. Thus, evidence of a statement by a young child or intellectually disabled person as to feelings of pain may be admitted.[22] Section 61(3) provides for a presumption of competency unless the contrary is proved.

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17 (1959) 101 CLR 298. The limitations of the principle should be kept clearly in mind. It enables (not requires) the court to draw an inference that the uncalled evidence would not have assisted the party's case. The principle only applies where a party is *required to explain or contradict* something.

18 (1990) 21 FCR 324.

19 *Arnotts v Trade Practices Commission* (1990) 24 FCR 313.

20 Note 18 *supra* at 330.

21 Competency is dealt with in Part 2.1 of the Act. It provisions are beyond the scope of this paper. It should be noted that significant changes to the concept of competency are introduced by the Act.

22 See the discussion of s 72 below.

VI. EXCEPTIONS TO THE HEARSAY RULE

A. Introduction

The Act provides for a series of exceptions to the hearsay rule. Professor Aronson has characterised the exceptions as falling into two categories: the first consists of exceptions which apply to single or first hand hearsay,[23] where the previous representation has been made to the witness; the second consists of multiple hearsay where the evidence of the previous representation is made through one or more intermediaries.[24] The statutory exceptions contain some significant modifications to the common law. They also remove the debate as to whether certain concepts are or are not hearsay. For example, contemporaneous statements about a person's health, feelings, sensations, intention, knowledge or state of mind were admitted as original evidence at common law, but are treated as an exception to the hearsay rule under s 72 of the Act.[25] Similarly, evidence admitted at common law as part of the res gestae is now admitted under s 65(2) as an exception.

B. First Hand Hearsay

Division 2 of the Act provides for the admissibility of first hand hearsay by way of an exception to the hearsay rule, thus implementing the ALRC's recommendations. Its introduction recognises that hearsay evidence is relevant evidence which, in appropriate circumstances, should be available to the fact finder in the proceedings. The conditions upon which its admissibility is based recognise and seek to redress the inherent problems in the admissibility of such evidence.

The basis of admissibility varies depends upon whether the evidence is sought to be given in a civil or criminal trial and further depends upon whether the maker of the statement is available to give evidence.

First hand hearsay is described in s 62 as follows:

> (1) A reference in this Division (other than subsection (2)) to a previous representation is a reference to a previous representation that was made by a person who had personal knowledge of an asserted fact.
>
> (2) A person has personal knowledge of the asserted fact if his or her knowledge of the fact was, or might reasonably be supposed to have been, based on something that the person saw, heard or otherwise perceived, other than a previous representation made by another person about the fact.

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23 'First hand hearsay' is the terminology used in the Act.

24 M Aronson, "The New Hearsay Rules and Proof of Documents by Affidavit", seminar paper, CLE Department of the College of Law (9 March 1994). See also M Aronson and J Hunter, *Litigation, Evidence & Procedure,* (5th ed, 1995) p 666.

25 *Gilbey v Great Western Railway Co* (1910) 102 LT 202.

VII. ADMISSIBILITY OF FIRST HAND HEARSAY IN CIVIL PROCEEDINGS

A. Maker of Representation not Available

Section 63 makes provision for the admission of oral and documentary first hand hearsay where the maker of a previous representation about an asserted fact is not available to give evidence. A document containing the representation or another representation to which it is reasonably necessary to refer in order to understand the representations is admissible under subsection (2)(b). Where the representation is in a document, the document will not be admissible unless the witness saw the document being created. To be admissible, the document must contain the representation and not merely record the representation.[26]

B. Maker of Representation Available to Give Evidence

Section 64 applies where the maker of the previous representation is available to give evidence. The section deals with two situations. The first, where it is intended not to call the witness, is dealt with in subsection (2). The second, where the person who made the representation has been or is to be called to give evidence, is dealt with in subsection (3).

Section 64(2) provides that the hearsay rule does not apply to the oral evidence of the previous representation given by "a person who saw, heard or otherwise perceived the representation being made" or to a document containing the representation or "another representation to which it is reasonably necessary to refer in order to understand the representation", if undue expense or delay would be caused by calling the person or it would not be reasonably practicable to call the person who made the representation. The notions of undue expense or delay and reasonable practicability are well established concepts in the law of evidence.[27]

Section 64(3) is narrower than the provisions of s 63. It provides:

> If the person who made the representation has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation given by:
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> (a) that person; or
> (b) a person who saw, heard or otherwise perceived the representation being made;
>
> if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.

The subsection throws up an initial factual issue. For a representation to be admissible under the subsection, it will be necessary to prove that when the representation was made, the occurrence of the asserted fact was fresh in the person's memory. The section does not require that the representation be made at or near to the time of the occurrence. However, the more remote in time such representation was made, the more there will be room for dispute as to whether the statutory precondition has been satisfied. Proof of the factual issue may not cause any real difficulty where the maker of the representation is the person giving

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26 See cl 6 of the Dictionary.

27 See *Evidence Act* 1898 (NSW) s 14B.

evidence. It may be more problematical where the evidence is being given by a person who saw, heard or otherwise perceived the representation being made.

The ALRC's justification for the restrictions in s 64(3) were the need for flexibility and reliability. It stated:

> There is very little to be gained by permitting the witness to refer to later statements as well as to give oral evidence. There is also the risk of wasted time and costs and the fabrication of statements... The proposal
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> - enables the witness to give uninterrupted evidence about what occurred at the relevant time (eg, what the butler said he saw);
> - enables the best evidence to be received in the sense of evidence that is the freshest;
> - removes the difficult and artificial line drawing of the present res gestae rules and the uncertainty as to what is the precise test to apply to decide whether something is part of the res gestae;
> - enables the document used to refresh the memory of a witness to be tendered;
> - enables the consistency as well as the inconsistency of the witness to be examined while minimising the risk of adding to the time and cost of trials resulting from the admission of hearsay evidence and minimises the risk of fabrication.[28]

Section 64(4) is an important procedural provision governing the time at which evidence is to be admitted. It provides that, subject to the leave of the court, a document containing a representation to which subsection (3) applies must not be tendered before the conclusion of the examination in chief of the person who made the representation. This section prevents a person's previous written statement (assuming it otherwise satisfies s 64(3)) from comprising that person's evidence in chief. It thus abrogates s 14B of the *Evidence Act* 1898 (NSW).[29]

VIII. ADMISSIBILITY OF FIRST HAND HEARSAY IN CRIMINAL PROCEEDINGS

First hand hearsay is also admissible in criminal proceedings. The circumstances in which it is admissible are also dependant upon whether the maker of the representation is or is not available to give evidence.[30]

A. Maker Unavailable to Give Evidence

Section 65 provides that the hearsay rule does not apply to evidence of a previous representation given by a person who saw, heard or otherwise perceived the representation being made in four cases, namely where the representation was: (a) made under a duty to make the representation or representations of that kind; (b) made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication; (c) made in circumstances which make it highly probable that the representation is reliable; or (d) against the interests of the person who made it at the time it was made.

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28 Note 3 *supra* pp 378-9.

29 See *Hilton v Lancashire Dynamo Nevelin Ltd* [1964] 2 All ER 769. The reason for this amendment is curious, given that the overriding theme of the Act is to put before the court the best available evidence.

30 Sections 65 and 66 respectively.

(i) Statements Made in the Course of Duty

Subparagraph (a) applies and expands the common law exception as to the admissibility of statements made in the course of duty. At common law, such statements were only admissible where the maker of the statement was dead. The record of the duty had to be made contemporaneously with the doing of the act and the declarant had to have no motive to misrepresent the facts. Not only has the range of persons whose representations may be admitted under the subparagraph expanded, the common law restrictions do not apply. However, should those factors not be present, the weight afforded to such evidence may be significantly affected. Alternatively, the evidence might be excluded under the court's discretion in s 135.

(ii) Contemporaneous Statements (Modification of the Res Gestae)

Subparagraph (b) modifies the res gestae principle by abrogating the decision in *Vocisano v Vocisano*.[31] In that case a statement by a person at the scene of an accident but made shortly after the accident was held not to be part of the res gestae because it lacked sufficient contemporaneity with the relevant occurrence, notwithstanding the circumstances of the making of the statement were such that it was unlikely to have been fabricated. As Barwick CJ stated:

> The res gestae rule does not mean that statements made on an occasion when they are not likely to be concocted are for that reason admissible.[32]

(iii) Reliable Statements

Subparagraph (c) reflects the approach of Mason CJ and Deane J in *Pollitt v R* that reliable evidence should be admissible.[33] The subparagraph has the effect of making admissible the little boy's and the mother's telephone calls in *Walton v R*,[34] the evidence of the daughter on the bridge in *R v Benz*,[35] and the evidence of the Berry's in *Pollitt* (subject to the view of McHugh J as to the inherent unreliability of such evidence). The admissibility of evidence under this provision is likely to be contentious. *Pollitt's case* demonstrates that different views may exist as to whether particular evidence is reliable. If there is an issue as to the

31 (1974) 130 CLR 267.

32 *Ibid* at 273.

33 Note 8 *supra*. In *Pollitt*, which involved a case of mistaken identity in a contract killing, two witnesses gave evidence of statements made by a third party. The statements were held to be admissible. Justices Brennan, Dawson and Gaudron considered the evidence to be original evidence, being conduct from which it could be inferred there was a contract. Chief Justice Mason, without deciding whether the evidence was hearsay, held it was admissible as it contained an implied assertion, was spontaneous and had a high degree of reliability. Justice Deane held it was hearsay but admissible as an exception to the hearsay rule, as there was little likelihood of fabrication and the statement containing the representation was sufficiently contemporaneous to the event. Justices Toohey and McHugh dissented. However, McHugh J recognised an exception to the hearsay rule where evidence had a high degree of reliability. However, he considered a conversation between two criminals did not fall into that category.

34 (1989) 166 CLR 283.

35 (1989) 168 CLR 110.

admissibility of such evidence, its admissibility is required by s 189 to be determined on the voire dire.[36]

(iv) Statements Against Interest

Subparagraph (d) extends the common law as to the admissibility of statements against interest. Under the common law, such statements were only admissible if the maker of the statement was dead. The rule was limited to statements against the deceased's personal or pecuniary interests and in respect of collateral matters mentioned in the representation. Not only are there no such statutory restrictions, s 65(7) provides an inclusive list of matters which are against interest. They are statements made which: (a) damage the person's reputation; (b) show that the person has committed an offence of which the person has not been convicted; or (c) show that the person is liable in damages.

B. Representations in Other Proceedings

Section 65(3) provides another exception to the hearsay rule in the case where a previous representation was made in other proceedings, either in Australia or overseas, where the defendant in the proceedings to which the exception is sought to be applied either cross-examined or had a reasonable opportunity to cross-examine the person who made the representation about it. 'Australian or overseas proceeding' is defined in the Dictionary to mean "a proceeding (however described) in an Australian court or a foreign court". It follows that under this provision, evidence given in a committal hearing could be admitted, provided the provisions of the section were otherwise satisfied.

Section 65(6) requires evidence of the making of the representation to be given by the production of an authenticated transcript. Section 65(4) affords protection to a co-defendant in the case where a representation in another proceeding is admitted. In that case, the evidence cannot be used against a defendant who did not cross-examine and did not have a reasonable opportunity to cross-examine the person about the representation.

For the purposes of these provisions, a person is deemed to have had a reasonable opportunity to cross-examine if the person could reasonably have been present at the time the evidence was given and, if present, could have cross-examined the person. The Act does not specify what constitutes a 'reasonable opportunity'. Could a defendant, who did not have the personal financial means to attend the other proceeding, successfully claim that he or she did not have a reasonable opportunity to attend? Would it be enough if the defendant could attend, but did not have the financial resources to retain a legal representative to cross-examine the person?[37]

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36 Although the general rule is that voire dire examinations are to be determined in the absence of a jury, the court has a discretion to order otherwise except whether the question is whether particular evidence is evidence of an admission or was improperly or illegally obtained: s 138(2) and (4).

37 In *Dietrich v R* (1992) 177 CLR 292 the High Court held that whilst the common law did not recognise the right of an accused to be provided with legal representation at public expense, courts had a power to stay criminal proceedings that will result in an unfair trial.

C. Hearsay Introduced by Defendant

Section 65(8) introduces a highly significant reform to the common law. It provides:

> The hearsay rule does not apply to:
>
> (a) oral evidence of a previous representation adduced by a defendant if the evidence is given by a person who saw, heard or otherwise perceived the representation being made; or
>
> (b) a document tendered as evidence by a defendant so far as it contains a previous representation, or another representation to which it is reasonably necessary to refer in order to understand the representation.

The subsection totally abrogates the rule in *R v Blastland*[38] and *Re Van Beelen*[39] that an accused cannot prove that a non-party is guilty by proving the confession or admission of that other person. It should be noted that the exception under subsection (8)(b) applies to "a document *tendered* as evidence" (emphasis added). It is not sufficient to give secondary evidence of the contents of the document.[40]

Finally, s 65(9) enables the Crown to adduce evidence which might reflect upon the hearsay evidence given under subsection (8). This provision is sometimes referred to as the 'retaliatory' hearsay exception. It provides that where evidence of a previous representation has been adduced by a defendant and admitted, the hearsay rule does not apply to another representation about the matter that is adduced by another party and is given by a person who saw, heard, or otherwise perceived the other representation being made. The effect of this latter qualification is that a document containing a representation is not admissible unless the witness saw the document being brought into existence.

D. Maker Available to Give Evidence

The hearsay rule does not apply where the maker of a previous representation is available to give evidence about an asserted fact. Section 66 provides:

> (1) This section applies in a criminal proceeding if a person who made a previous representation is available to give evidence about an asserted fact.
>
> (2) If that person has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by:
>
> (a) that person; or
>
> (b) a person who saw, heard or otherwise perceived the representation being made,
>
> if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.
>
> (3) If a representation was made for the purpose of indicating the evidence that the person who made it would be able to give in an Australian or overseas proceeding, subsection (2) does not apply to evidence adduced by the prosecutor of the representation unless the representation concerns the identity of a person, place or thing.

38 [1986] AC 41.

39 (1974) 9 SASR 163.

40 See s 48(1)(a) and (4).

(4) A document containing a representation to which subsection (2) applies must not be tendered before the conclusion of the examination in chief of the person who made the representation, unless the court gives leave.

Subsection (2) differs in a significant way from its civil proceeding counterpart (s 64(2)) in that it does not contain any provision excusing the attendance of the witness. The provision that the representation had to be made when the occurrence was fresh in the maker's memory is the same. It follows that the same issues will arise in determining that factual issue as in the case of s 64(2).

The section allows a person who was present at an identification to give evidence of the terms of the identification.[41]

Section 66(2) will also have a significant impact on sexual assault trials. At common law, evidence of the fact and terms of complaint were only admitted for credibility purposes.[42] Under the section, evidence of the terms of complaint will be admissible to prove the truth of the complaint provided the terms of complaint are relevant to a fact in issue. The terms of complaint may be relevant, for example, to the nature of the sexual assault, where the sexual assault happened, or as to the identity of the alleged offender.

IX. NOTICE PROVISIONS

Section 67(1) requires reasonable notice of the intention to adduce evidence under ss 63(2), 64(2) and 65(2), (3) and (8) to be given. Notice is not necessary for the purposes of s 66. Section 67(2) provides that the notice must comply with the regulations and any rules of court. Regulation 5 prescribes the content of the notice. In addition, s 67(3) provides that the notice must state the particular section of the Act sought to be relied upon and, in the case of evidence sought to be adduced under s 64, the grounds upon which it is intended to rely. The court retains a discretion under s 67(4) to admit first hand hearsay where the appropriate notice has not been given. The court may impose conditions upon the admissibility of such evidence.[43]

A party has seven days to give notice that it will oppose the excusing of a witness in a civil proceeding where it is proposed not to call the witness due to undue expense or delay or reasonable impracticability. This objection can be dealt with before trial. Section 68 provides that costs penalties may apply if an objection is unreasonably taken.

Before leaving the notice provisions, reference should be made to the provisions of Part 4.6, which enable a party to make requests about certain matters, including a previous representation. The request must be made within 21 days of the s 67 notice being given. Leave can be granted to waive that time period. If there is a failure to comply with the request, the court can order compliance or order that the evidence of the previous representation not be admitted. A party may, within a

41 See *Alexander v R* (1981) 145 CLR 395.

42 See *Kilby v R* (1973) 129 CLR 460; *R v Lillyman* [1896] 2 QB 167; *R v Osborne* [1905] 1 KB 551; *R v Manwaring* [1983] 2 NSWLR 82.

43 Section 67(5).

reasonable time, tell the other side it refuses to comply with the request, leaving it open to the requesting party to apply to the court for orders under the section.

X. MULTIPLE HEARSAY

The sections which provide for the admissibility of multiple hearsay are, in large measure, self-explanatory, and are most easily understood by direct reference to the sections of the Act. The business records provisions, however, require more detailed examination. It should be said that the multiple hearsay provisions are practical and welcome exceptions to the hearsay rule. They overcome the rejection of reliable evidence on technical grounds and eliminate the often sterile debate as to whether evidence is original or hearsay evidence and, if hearsay, whether it is admissible as an exception to the hearsay rule.

A. Business Records Exception

The business records provisions of the Act are similar to the provisions of Part III of the *Evidence Act* 1905 (Cth). There are, however, a number of significant differences, both substantive and procedural. There is also a structural change. In the *Evidence Act* 1905 (Cth), the authentication of documents provisions were contained within the business records provisions. The Act deals separately with these two issues. The business records provisions are contained in Part 3.2. Part 2.2 deals with proof and authentication of documents. Part 4.3 makes provision for the facilitation of proof. The procedural differences introduce a number of simple but common sense reforms. Many of these recognise the impact of technology.

The original evidence rule is abolished by s 51. The contents of documents may now be produced in a variety of ways provided for in s 48. Significantly, evidence of an admission made in a document may be adduced by adducing oral evidence of the contents of the document. Copies, transcripts, computer generated records, extracts of business records and copies of public document are admissible under s 48(1) to prove the contents of documents. The procedural reforms relating to the production of such documents would then apply. For example, photocopies and faxes are presumed to be authentic by ss 146 and 147, unless there is sufficient evidence to raise a doubt against this presumption.

The business records provisions have a wider application in relation to Commonwealth records. Section 182 provides that s 69 (amongst other sections) applies in relation to documents which were at the time they were produced, or are, Commonwealth records. 'Commonwealth records' are defined in the Dictionary. They include records made by the Parliament or a House of the Parliament, which would not fall within the concept of records kept by a 'business'.

Under the Act, a representation contained in a business record will be admitted as an exception to the hearsay rule, when the criteria in s 69 are met. It is important to note that it is not the business record itself which is admissible but the previous representation made in the business record. Save for one possible exception, this reflects the former business record provisions which made a statement in a

document admissible.[44] The possible exception is significant. Under the 1905 Act (and the 1898 New South Wales Act), 'statement' was defined in s 7A to include any representation of fact, whether made in words or otherwise. Section 7B(3) provided that 'fact' included 'opinion' for the purpose of the admissibility of the fact contained in a document. There is no equivalent provision in the Act. The answer may lie in the combined application of the opinion evidence provisions in Part 3.3, ss 76 to 80, and the "Proof of Documents" provisions in Part 2.2, and in particular s 48.

There are three pre-conditions to admissibility of a representation in a business record.[45] Firstly, s 69(1)(a)(i) and (ii) require that the document form part of the records of the business. Secondly, s 69(1)(b) stipulates that the representation made in the document must have been made in the course of, or for the purposes of, the business. Thirdly, s 69(2) provides that the representation must be either made by a person who had personal knowledge of the asserted fact or on the basis of information directly or indirectly supplied by a person who had personal knowledge of the asserted fact. There is no 'qualified person' requirement in the Act.[46]

Section 69 thus introduces fundamental changes to the business records provisions. Under the former provisions, a qualified person not only had to have had the relevant relationship with the business, but also (except in the case of statements of experts) personal knowledge of the facts stated. There is no relationship requirement in s 69. Further, under subparagraph (2)(b) more remote hearsay is admissible. Finally, statements of opinions in documents do not appear to be admissible under the business records provisions.

The criteria for admissibility must be read in light of the definitions of 'document', 'business' and 'representation',[47] found in the Dictionary.

'Document' is defined as "any record of information". Examples include anything on which there is writing or marks, figures, symbols or perforations having a meaning for persons qualified to interpret them. It also includes anything from which sounds, images or writings can be reproduced with or without the aid of anything else and a map, plan, drawing or photograph. The definition also makes it clear that a reference in the Act to a document includes a reference to the copy of a document, or to a part of the document.

'Business' is also broadly defined in Part 2 cl 1 of the Dictionary. It includes a profession, calling, occupation, trade or undertaking and extends to non-profit businesses and businesses carried on outside Australia. It also extends to activities carried on by the Crown, a person holding office under an Australian law and the proceedings of an Australian Parliament. Activities engaged in by a foreign

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44 *Evidence Act* 1905 (Cth) s 7B; *Evidence Act* 1898 (NSW) s 14CE.

45 The pre-conditions of admissibility are based on the previous statutory provisions with some modification.

46 *Evidence Act* 1905 (Cth) s 7B(1)(c)(ii); *Evidence Act* 1898, (NSW) s 14CE. Under the 1905 Act, business records were admissible where the statement in a document was made by a qualified person. A 'qualified person' was an owner of the business, or a person carrying on the business, a servant or agent employed by the business, a person retained for the purposes of the business, or a person associated with the business in the course of another business. Business records were also admissible where the statement was derived from information from devices designed for and used for the purposes of the business in recording, measuring, counting or identifying information.

47 The definition of 'representation' is set out above.

government and the proceedings of a foreign country's legislature are also included in the definition.

'Negative hearsay' may also be proved in relation to business records. Thus, where a business has a system for recording particular events, and the happening of the event is in issue, the fact that no record of the event was made will be admissible under s 69(4) to show that the event did not happen.

The business records provisions do not apply to representations made in contemplation of or in connection with either Australian or overseas proceedings. Nor do they apply to representations made in connection with an investigation relating or leading to criminal proceedings.[48] Thus, representations made in the course of a commission of inquiry or to permanently established commissions such as the Independent Commission Against Corruption would not be admissible.

The Act provides a number of safeguards to ensure that evidence admitted under the business records provisions is reliable. In the 1905 Act, most of these safeguards were found in Part IIIA. However, the relevant sections appear throughout the 1995 Act. The most significant procedural safeguards are found in Part 4.6. A party may request that a person who has made a previous representation be called as a witness. A party may also request that a person who has been concerned with the production or maintenance of a document be called as a witness.[49] Where a party has not complied with a reasonable request, it is open to the court to order pursuant to s 169(1)(c) that the evidence in relation to which the request was made not be admitted.

B. Bags, Labels and Tabs

Section 70 states:

> (1) The hearsay rule does not apply to a tag or label attached to, or writing placed on, an object (including a document) if the tag or label or writing may reasonably be supposed to have been so attached or placed:
>
> (a) in the course of a business; and
>
> (b) for the purpose of describing or stating the identity, nature, ownership, destination, origin or weight of the object, or of the contents (if any) of the object.
>
> (2) This section, and any provision of a law or a State or Territory that permits the use in evidence of such a tag, label or writing as an exception to a rule of law restricting the admissibility or use of hearsay evidence, does not apply to:
>
> (a) a Customs prosecution within the meaning of Part XIV of the *Customs Act* 1901;
>
> (b) an Excise prosecution within the meaning of Part XI of the *Excise Act* 1901.

This provision allows the identity or description of an object to be established by proof of a tag, label or writing attached to the object. This is a practical rule. It overcomes the limitations of the business records provisions as it applied to tags and labels. The section does not affect the averment provisions of the *Customs Act* and the *Excise Act*, which provide that the averment of the prosecutor in the information or complaint, are prima facie evidence of the matter averred.

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48 Section 69(3).

49 Sections 166 and 167.

C. Telecommunications

Section 71 states:

> The hearsay rule does not apply to a representation contained in a document recording a message that has been transmitted by electronic mail or by a fax, telegram, lettergram or telex so far as the representation is a representation as to:
>
> (a) the identity of the person from whom or on whose behalf the message was sent; or
> (b) the date on which or the time at which the message was sent; or
> (c) the message's destination or the identity of the person to whom the message was addressed.

It should be noted that s 182 makes this rule more extensive for the purposes of Commonwealth records.

D. Statement About Health and Feelings

Section 72 states:

> The hearsay rule does not apply to evidence of a representation made by a person that was a contemporaneous representation about the person's health, feelings, sensations, intention, knowledge or state of mind.

Historically, there has always been debate as to whether such statements were original or hearsay evidence. The authorities and commentators have, overall, favoured the view that the statements are original evidence. Now, they are admissible as excepted hearsay. The section is relevant to the type of evidence given in *Pollitt's case*.[50] It will be recalled that the Berry's gave evidence of what someone else said on the phone. That evidence would still be admissible to prove that person's belief or state of mind, including that person's belief as to the identity of the caller.

E. Reputation as to Relationships and Age

Section 73 states:

> (1) The hearsay rule does not apply to evidence of reputation concerning:
>
> (a) whether a person was, at a particular time or at any time, a married person; or
> (b) whether a man and a woman cohabiting at a particular time were married to each other at that time; or
> (c) a person's age; or
> (d) family history or a family relationship.
>
> (2) In a criminal proceeding, subsection (1) does not apply to evidence adduced by the prosecutor unless it tends to contradict evidence of a kind referred to in subsection (1) that has been admitted.

F. Reputation of Public or General Rights

Section 74 states:

> (1) The hearsay rule does not apply to evidence of reputation concerning the existence, nature or extent of a public or general right.

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50 Note 8 *supra*.

(2) In a criminal proceeding, subsection (1) does not apply to evidence adduced by the prosecutor unless it tends to contradict evidence of a kind referred to in subsection (1) that has been admitted.

These provisions do not take away the primary onus in criminal proceedings upon the prosecutor to prove such matters by adducing original evidence, unless such evidence is rebuttal evidence, in which case it may rely upon subsection (2). Subsection (2) is available at all times to a defendant in criminal proceedings.

XI. INTERLOCUTORY PROCEEDINGS

Section 75 states:

> In an interlocutory proceeding, the hearsay rule does not apply to evidence if the party who adduces it also adduces evidence of its source.

There has long been similar provisions in the various rules of court. Such evidence would now be admissible, either under the rules of court or under this section.

XII. DISCRETION, WAIVER, WARNINGS AND AGREEMENT AS TO FACTS

There are four further areas in the Act which have an important bearing on the hearsay rule. They are the provisions relating to discretion, waiver, warnings and agreements as to facts.

A. Discretion

Part 3.11 gives the court various discretions in relation to otherwise admissible evidence.[51]

Section 135 gives the court a general discretion to exclude evidence in three circumstances. The section provides:

> The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:
>
> (a) be unfairly prejudicial to a party; or
> (b) be misleading or confusing; or
> (c) cause or result in undue waste of time.

The provision recognises that in certain cases, otherwise relevant and admissible evidence should be rejected.

Section 136 gives the court a discretion to limit the use to which evidence can be put. It provides:

> The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might:
>
> (a) be unfairly prejudicial to a party; or
> (b) be misleading or confusing.

51 Sections 135-137; the two final provisions of Part 3.11, ss 138-139, deal with improperly obtained evidence.

It is to be anticipated that these sections will be regularly agitated where an opposing party seeks to have evidence, admitted for a non-hearsay purpose, used for all purposes.[52] This will be so in criminal trials in particular, and in civil cases where commercial procedures for the admission of evidence are not in play. This could be highly disruptive in a trial with a jury as, unless the court otherwise directs, such questions have to be determined in the absence of the jury.[53] In criminal cases in particular, the prosecution might be well advised to weigh up the convenience of using hearsay evidence and the inconvenience of spirited resistance through ss 135 and 136 applications. In addition, any party seeking to adduce hearsay evidence will have to be conscious of the possibility that it may be rejected or admitted for limited purposes only and be in a position to call original evidence, should the asserted fact be a fact in issue in the proceedings.

Section 137 affords protection to a defendant in a criminal trial in the case of evidence where its probative value is outweighed by its prejudicial nature. In that case, the court must refuse to admit the evidence. This introduces another important change to the common law, which provided for a discretion in such circumstances.[54]

B. Waiver

Section 190 provides that the court may by order, if the parties consent, dispense with the rules of evidence in a broad range of areas. The parties may dispense with the general rules about giving evidence and rules in relation to examination in chief, re-examination and cross-examination provided for in Divisions 3, 4 and 5 of Part 2.1. This should assist the streamlining of complex commercial litigation.

Particular provision is made in relation to criminal proceedings. Section 190(2) provides that a defendant's consent is ineffective unless the defendant's lawyer has advised the defendant to give consent or the court is satisfied that the defendant understands the consequences of giving consent.

The court has an even wider discretion in civil proceedings. Section 190(3) provides that it may order that the various provisions of the Act not apply, including the provisions relating to hearsay and opinion evidence. The discretion is limited, however, to circumstances where the matter in question is not seriously in dispute or it would involve undue expense or delay if the provisions of the Act were to be applied. This provision reflects Order 33 r 3 of the Federal Court Rules.[55]

C. Warnings

Section 165(2) provides that in a jury trial (civil or criminal) the judge must, upon being requested by a party to do so, warn the jury that certain evidence may be unreliable. Subsection (1) provides that hearsay evidence, identification evidence and evidence of admissions is evidence of a kind which may be

52 See, for example, ss 43, 60 and 108.

53 See s 189.

54 *R v Christie* [1914] AC 545.

55 See note 19 *supra*. See the discussion of survey evidence in Part XV below.

unreliable. Subsection (3) retains a discretion in the judge not to give a warning "if there are good reasons for not doing so".

D. Agreement as to Facts

Section 191 provides that where the parties to a proceeding agree that, for the purposes of the proceedings, a fact is not to be disputed, that fact will be regarded as an 'agreed fact'. Subsection (3) requires the agreement to be in writing, signed by the parties or their legal representatives and to be adduced in evidence. Subsection (2) disallows the adducing of further evidence to prove the existence of the agreed fact or to qualify or contradict the fact.

XIII. OPINION EVIDENCE

Prior to the Act there was no statutory provision governing the reception of opinion evidence. Part 3.3 changes this. Section 76 provides:

> Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

The effect of this provision is that the primary facts about which an opinion is sought to be adduced still need to be proved in a way which is permitted by the Act, including under s 60.

There are numerous exceptions to s 79, namely: summaries of voluminous or complex documents (s 50(3)); evidence relevant otherwise than as opinion evidence (s 77); lay opinion (s 78); expert opinion (s 79); admissions (s 81); exceptions to the rule excluding evidence of judgments and convictions (s 92(3)); and evidence of character of defendants and co-defendants (ss 110 and 111). Special mention should be made of ss 77, 78 and 79.

A. Evidence Relevant Otherwise than as Opinion Evidence

Section 77 provides that the opinion rule does not apply to:

> ...evidence of an opinion that is admitted because it is relevant for a purpose other than proof of the existence of a fact about the existence of which the opinion was expressed.

The section reproduces, in relation to opinion evidence, the provisions of s 60 in relation to hearsay evidence. The comments made in relation to that section also apply to this section, save to the extent that they deal with different types of evidence. The effect of s 77, however, is far more problematical. It is one thing to provide that hearsay evidence may be used as evidence of the facts asserted. It is another matter to provide that evidence of an opinion may become evidence of the facts about which it is expressed. It is interesting that in the 1993 Bill, an example of the operation of the section was contained in the note to the section which demonstrated its extraordinary effect. No examples have found their way into the Act. It cannot be expected that evidence of this nature will, as a matter of course, be left unchallenged. It may be that the legislature, in its attempts to smooth the road to admissibility, has created instead a fertile field of litigation.

B. Lay Opinion Evidence

Section 78 provides that the opinion rule does not apply to the opinion of a witness if the opinion is based upon what the person

> ...saw, heard or otherwise perceived about a matter or event and evidence of the opinion is necessary to obtain an adequate account or understanding of the person's perception of the matter or event.

This appears to be the statutory enactment of current law, or at least of current practice.

Section 79 provides an exception to the opinion rule. It provides:

> If a person has specialised knowledge based on the person's training, *study or experience*, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge. (emphasis added)

Section 79, dealing with opinions based on specialised knowledge, overcomes the necessity of the common law expert evidence rule that expert evidence can only be given by a person expert on a subject which itself involves special skills or knowledge. This aspect of the opinion evidence provision is a direct rejection of the American '*Frye* test'.[56] The *Frye* test required that:

> An expert's opinion be related to a recognised field of expertise or result from the application of theories or techniques accepted in that field.[57]

C. Expert Evidence

Section 79 encompasses evidence such as was held to be admissible in *Weal v Bottom*.[58] In that case Barwick CJ upheld as admissible evidence of a witness who had driven motor vehicles for 30 years and who had on many occasions driven articulated vehicles. More specifically, over a period of 18 years the witness had been driving vehicles including articulated vehicles around the curve upon which the accident the subject of the proceedings had occurred. The Chief Justice said:

> [I]t would be very surprising if a course of study by reading and instruction warranted the admission of a statement as to the behaviour of a vehicle derived from its nature whereas a long course of actual experience in the use of the vehicle or of observation of its actual behaviour in relevant circumstances did not qualify a person to speak as to such behaviour.[59]

Justice Menzies rejected the admissibility of such evidence. His Honour said:

> [T]he evidence, given by witnesses who are not eye witnesses and whose expert knowledge - such as it was - was not scientific, was clearly enough intended to conjure up a picture of what occurred when the two vehicles collided. The so-called experts' evidence gave no explanation of proven facts by reference to some organised branch of knowledge.[60]

Chief Justice Dixon had also accepted the admissibility of such evidence in *Clark v Ryan*, where his Honour said:

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56 *Frye v United States* 293 F 1013 (1932).

57 Note 3 *supra* at [148]. In *Daubert v Merrell Dow Pharmaceuticals* (1993) 61 USLW 4805, the United States Supreme Court held that *Frye* had been superseded by the Federal Rules of Evidence, approved in 1975. Section 79 is wider than both the *Frye* and *Daubert* principles.

58 (1966) 40 ALJR 436.

59 *Ibid* at 439.

60 *Ibid* at 445.

> [I]f it had been desired to prove how in fact semi-trailers of the kind driven by the defendant Clark do in practice behave, perhaps a witness or witnesses experienced in their actual use might have given admissible evidence, not of opinion, but of the fact...if it had been desired to give technical evidence of the physics involved and of any relevant opinions deduced therefrom, possibly that might have been done by a qualified witness although one might doubt how intelligible to the jury the evidence would have been and what useful purpose it would have served.[61]

Justice McLelland identified this category of admissible expert evidence in *Ritz Hotel Ltd v Charles of the Ritz Ltd [No 7]* as follows:

> ...there is a category of admissible 'expert' evidence which consists of a generalisation from observed facts within the personal experience of the witness in a field outside ordinary lay experience.[62]

His Honour referred to *Weal v Bottom* as falling within this category. His Honour continued:

> ...similarly, evidence may be adduced from an experienced participant in a particular trade, of a special meaning attached by usage to be expressed in a contract entered into in the course of that trade (see, for example, *Appleby v Pursell* [1973] 2 NSWLR 879) or of a practice as evidence of a trade usage: see for example *Thornley v Tilley* (1925) 36 CLR 1 at 8...an early example is provided by the Irish case of *McFadden v Murdock* (1867) IR 1 CLR 211 at 219-220 and 222, where it was held that evidence would be admissible from someone experienced in a particular kind of retail trade as to the usual deficit in sales of certain kinds of article in small portions in the course of such trade.[63]

In addition to the rejection of the American *Frye* test, the common law rules excluding evidence of opinion about matters of common knowledge and about ultimate issues have been abolished.[64]

XIV. ADMISSIONS

Part 3.4 of the Act deals with admissions, which, under s 81, are excepted from the operation of the hearsay and the opinion rules. An 'admission' is defined in the Dictionary as a previous representation made by a party to a proceeding, including a defendant in criminal proceedings, which is adverse to the person's interest in the outcome of proceedings.

Representations made in relation to an admission, at a time contemporaneous with the admission, are also exempted by s 81(2) from the operation of the hearsay and opinion rules, provided that it is reasonably necessary to rely on such representations in order to understand the admission.

However, only first hand oral or documentary hearsay evidence of an admission may be adduced. More remote hearsay remains excluded by the hearsay rule under s 82. Consistently with other provisions in this Part, an admission in a document is only admissible if it is contained in the document. It is not sufficient if it is merely recorded in the document.

The interests of a party to the proceedings other than the party who made the

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61 (1960) 103 CLR 486 at 490-1.
62 (1987) 14 NSWLR 104 at 105.
63 *Ibid.*
64 Section 80.

admission (a third party) are protected by s 83. The Act provides for the consent of a third party to be given for the evidence of an admission to be used. Consent can not be to only a part of the evidence.

Sections 84, 85 and 86 seek to ensure that evidence of admissions is reliable and that the admission was not coerced. Section 84(1) provides that evidence of an admission is not admissible unless the court is satisfied the making of the admission was not influenced by

> violent, oppressive, inhuman or degrading conduct towards the person who made the admission or *towards another person.* (emphasis added)

Subsection (1) does not arise unless and until the party against whom the admission is sought to be adduced, raises an issue in the proceeding that the admission was so influenced. Once an issue is raised, the onus is on the party seeking to adduce the admission to satisfy the court that the admission does not offend subsection (1).

Sections 85 and 86 relate to admissions in criminal proceedings only. Section 85 replaces the common law rule of voluntariness and is directed at the reliability of admissions. It is restricted to evidence of admissions made during the course of the "official questioning" or "as a result of an act of another person who is capable of influencing the decision whether a prosecution of the defendant should be brought or should be continued".[65]

Section 85(2) excludes the admissibility of evidence "unless the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was not adversely affected."

Unlike s 84, the onus at all time remains upon the prosecution to satisfy the court that an admission was reliable. In determining that matter, s 85(3) allows the court to take into account all relevant circumstances, including "any relevant condition or character" of the person making the admission. The subsection specifies age, personality, education and mental, physical or intellectual disability as falling within the definition. Cultural factors and a person's transient physical or mental condition (for example, due to affectation by drugs or alcohol) would also fall within the subsection. The court is also to take into account the nature and manner of questioning and the nature of any threat, promise or other inducement.

Unsigned confessions or admissions are excluded by s 86. This replaces the rule in *Driscoll v R* that unsigned records of interview could be excluded as a matter of discretion.[66]

However, under s 90 the court maintains an overall discretion to reject evidence sought to be adduced by the prosecution if, "having regard to the circumstances in which the admission was made, it would be unfair to a defendant to use the evidence".[67]

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65 'Official questioning' is defined in the Dictionary to mean "questioning by an investigating official in connection with the investigation of the commission or possible commission of an offence."
'Investigating official' is also determined to mean "a police officer or person appointed under an Australian law and whose functions include the investigation of offences". The provision would include officers of bodies such as the National Crime Authority.

66 (1977) 137 CLR 517.

67 *R v Lee* (1950) 82 CLR 133.

In addition, s 138 provides that the court must not admit evidence improperly or illegally obtained or obtained "in consequence of an impropriety" unless the "desirability in admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained".[68]

Section 90 protects a party's right to silence. It provides:

> In a criminal proceeding, the court may refuse to admit evidence of an admission, or refuse to admit the evidence to prove a particular fact, if:
>
> (a) the evidence is adduced by the prosecution; and
> (b) having regard to the circumstances in which the admission was made, it would be unfair to a defendant to use the evidence.

The section is intended to overrule *Woon v R.*[69]

XV. MARKET RESEARCH AND SURVEY EVIDENCE - ORIGINAL EVIDENCE, HEARSAY OR BEST PRACTICE?

Survey evidence is often adduced in intellectual property cases, passing off actions and actions under Parts IV and V of the *Trade Practices Act* 1974 (Cth). Its relevance has long been accepted, although the basis of its admissibility has been uncertain. It appears that two or possibly three views had developed as to its admissibility. In *Ritz Hotel v Charles of the Ritz Ltd* McLelland J identified two alternative bases of admissibility.[70] Weston has identified three.[71] In the *Ritz Hotel case*, McLelland J said:

> There is a substantial preponderance of authority in support of the proposition that survey evidence, and expert evidence in relation thereto, are admissible to prove the state of mind of the public or a section of the public on some particular matter, when that is an issue. However, two distinct bases emerge from the cases in justification of the admissibility of such evidence. The first is that although out of court statements by persons interviewed in the course of a survey as to their impressions or opinions are of a hearsay nature, the admission of such statements as evidence of the existence of those impressions or opinions falls within a recognised exception to the hearsay rule. On this approach, the primary evidence is that of the individual responses of those interviewed, interpretative expert evidence being subsidiary. The second basis is that such statements are to be treated not as hearsay, but as original data providing a foundation for expert evidence as to the state of public opinion on the matter in question. On this approach, the primary evidence is that of the expert, and evidence of the individual responses is subsidiary.[72]

In the *Ritz Hotel case*, the survey evidence was tendered in support of a case that particular trade marks would deceive or cause confusion to members of the public. The particular issue to which the evidence was directed was to show the public perception of the significance of the word 'Ritz', not to prove the correctness of the perception. Justice McLelland held that that evidence fell

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68 *R v Ireland* (1970) 126 CLR 321 at 335; *Bunning v Cross* (1977) 141 CLR 54 at 72-4 which held the court had a discretion to reject evidence illegally or unfairly obtained.

69 (1964) 109 CLR 529. Professor Aronson argues that the section may not succeed in overruling *Woon* as, in that case, the adverse inference was not derived from silence alone, but from other factors as well, including selective silence and suspicious behaviour and body language. Note 24 *supra* p 48.

70 (1988) 15 NSWLR 158.

71 T Weston, "Market Survey Evidence - Admissibility and Weight" [1987] *New Zealand Law Journal* 28.

72 Note 70 *supra* at 178.

within a recognised exception to the hearsay rule.

According to Weston, prior to the New Zealand High Court's decision in *Noel Leeming Television Limited v Noels Appliance Centre Limited*[73] there were

> ...three positions in relation to market survey evidence... Either it was not hearsay at all (admitted to show a designated opinion held by the public), or it was a recognised exception to the rule (public state of mind on a specific question) or, thirdly, it was admitted as some new, but largely undefined, exception to the rule (the English approach).[74].

In the *Noel Leeming Television case*, a passing off case, the applicant commissioned a market research survey for the purpose of establishing that its market reputation had been damaged by the alleged activities of the respondent. Justice Holland held that the evidence was not hearsay but was tendered as a foundation for an expert's opinion. This was consistent with the statement of Mahon J in the earlier New Zealand decision of *Custom Glass Boats Limited v Salt House Bros Limited.*[75] In that case the survey evidence had been admitted by consent. However, Mahon J had commented that such evidence was not hearsay at all.

In the United Kingdom, survey evidence had come to be admitted without any definitive basis being propounded for its reception. See *Bailey v Clark Sun & Morland*[76] and *General Electric Co v General Electric Co Limited.*[77] In both cases a small number of interviewees had filed individual affidavits as to their responses. The balance of responses to the survey were annexed to a single affidavit. In *Bailey,* Wright MR held that the affidavit evidence of the individual interviewees was admissible, but the balance of the responses were not.[78] Indeed, his Lordship stated that the court found it

> ...highly embarrassing...to have before it documents of that kind which have no evidential value at all and...cannot be looked at as a matter of evidence.[79]

There was no discussion of the basis of admissibility of one portion of the evidence and the rejection of the other. However, in *General Electric* the whole of the survey evidence was admitted, without any examination of the basis of its admissibility.

In *Imperial Group PLC v Philip Morris Limited* the court again did not concern itself with the basis of admissibility, but rather with the attributes that the survey must possess if it is to be given evidentiary weight.[80] Justice Whitford stated:

> Of course, if a survey is to have any validity at all, the way in which the interviewees are selected must be established as being done by a method such that a relevant cross-section of the public is interviewed... Any survey must of course be of a size which is sufficient to produce some relevant result viewed on a statistical basis. It must be conducted fairly. ...
>
> If survey evidence is to be of any weight at all it can only be of weight if in any case where, as here, a number of surveys have been carried out the plaintiffs give--and they

73 [1985] BCL 1669.
74 Note 71 *supra* at 61.
75 [1976] 1 NZLR 36.
76 (1937) 54 RPC 134.
77 [1972] 1 WLR 729.
78 (1937) 54 RPC 134 at 145.
79 *Ibid* at 150.
80 (1984) RPC 293.

> must give this to the defendants before the action comes on--the fullest possible disclosure of exactly how many surveys they have carried out, exactly how those surveys were conducted and the totality of the number of persons involved, because otherwise it is impossible to draw any reliable inference that answers given by one or two or three people in one survey might conceivably be said to indicate that similar answers would be given if a survey covering the entire smoking population or the entirety of retail tobacconists were carried out.
>
> Great importance inevitably attaches to the way in which the questions are cast.[81]

Until the decision of Burchett J in *Shoshana Pty Ltd and Sue Smith v 10th Cantanae Pty Ltd*,[82] the Australian courts had tended against the admissibility of survey evidence.[83] However, in *Shoshana*, Burchett J reversed that position. The applicant was a well known television personality who endorsed products. An advertisement appeared in various magazines with words forming a caption that included the applicant's name, Sue Smith, and bearing a likeness to the applicant. The respondents denied that the advertisement referred to the applicant or that the use of the name 'Sue Smith' was intended to be a reference to a real person. The applicant led survey evidence with respect to the public prominence of the applicant as a television personality as being relevant to her capacity to attract engagements for reward. His Honour found that the survey evidence was admissible on a number of bases. First, the responses to the survey were not hearsay but original evidence of the interviewee's state of mind. His Honour stated:

> [W]hat has to be proved is not that the opinions surveyed are true. True or false, a good opinion of Sue Smith held by a large number of people is relevant to establish her capacity to attract engagement for reward to endorse products.[84]

Secondly, his Honour referred to English authority that adopted what Mahon J had said in the *Custom Glass Boats* case as another basis of admissibility, namely that:

> ...such evidence is not hearsay at all, but is evidence proving an external fact, namely, that a particular opinion was held by the public or class of public.[85]

Thirdly, the survey material was part of the foundation of the expert opinion compiled from a field wider than the issue before the court. This is a basis which has been expressed in other cases, both before and after *Shoshana*.[86]

In *Arnotts Ltd v Trade Practices Commission* the Full Court of the Federal Court dealt with the basis of admissibility of survey evidence.[87] In that case, a survey had been conducted to establish the extent to which other foods could be substituted for biscuits. Interviews were conducted by about 120 persons and there were 1200 interviewees. Three of the interviewers were called to give evidence.

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81 *Ibid* at 302-3.

82 (1988) 79 ALR 279.

83 *Hoban's Glynde Pty Ltd v Firle Hotel Pty Ltd* (1973) 4 SASR 503; *McDonald's System of Australia Pty Ltd v McWilliams Wines Pty Ltd* (1979) 28 ALR 236; *Mobil Oil corporation v Registrar of Trade Marks* (1983) 51 ALR 735.

84 Note 82 *supra* at 295.

85 *Lego System Aktieselskab v Lego M Lemelstrich Ltd* [1983] FSR 155 at 178-9.

86 *Ibid*; note 73 *supra* per Holland J.

87 Note 19 *supra*.

The judge at first instance then admitted the balance of the responses to the survey under Order 33 r 3 (allowing the court to dispense with the rules of evidence where it would otherwise cause undue expense or delay).

The Full Court held that this survey evidence was intended to be relied upon to prove the facts asserted and was thus hearsay. It also recognised that some survey evidence might be original evidence. However, the Court held that such evidence could be admitted, not as an exception to the hearsay rule, but as a matter of discretion, pursuant to Order 33 rule 3 of the Federal Court Rules. It held that, given the existence of the discretion

> ...it seems more sensible to concentrate attention upon the necessity for, and reliability of, the survey evidence; rather than to worry about its compliance with rules regarding hearsay evidence which were developed before this type of problem arose.[88]

In determining what characteristics the survey evidence should have to render it sufficiently reliable to be admissible, the court approved the criteria in the Handbook of Recommended Procedures for Trial of Protracted Cases:

> The offeror has the burden of establishing that a proffered poll was conducted in accordance with accepted principles of survey research, that is, that the proper universe was examined, that a representative sample was drawn from that universe, and that the mode of questioning the interviewees was correct. He should be required to show that: the persons conducting the survey were recognised experts; the data gathered was accurately reported; the sample design, the questionnaire and the interviewing were in accordance with generally accepted standards of objective procedure and statistics in the field of such surveys; the sample design and the interviews were conducted independently of the attorneys; and the interviewers, trained in this field, had no knowledge of the litigation or the purposes for which the survey was to be used. Normally this showing will be made through the testimony of the persons responsible for the various parts of the survey.[89]

The Court concluded that the admissibility of survey evidence through the provisions of Order 33 r 3 should depend upon compliance with those criteria. The Court also recommended that the course suggested in *Greynell Investments Pty Ltd v Hunter Douglas Ltd*[90] be followed where survey evidence was intended to be adduced. In *Greynell*, Lockhart J made a consent direction applying conditions that would not render the survey evidence inadmissible on the ground that it was hearsay. Those directions, which bear a close resemblance to the American Handbook practice, were:

(a) The respondent establishes that the survey was designed and conducted in accordance with accepted principles of survey research producing a result which is trustworthy, including (without limiting the generality of the foregoing):
    (i) That the proper universe was examined.
    (ii) That a representative sample was drawn from that universe.
    (iii) That the persons conducting the survey were recognised experts.
    (iv) That the data gathered was accurately recorded.
    (v) That the questionnaire, sample design and interviewing were in accordance with generally accepted standards of objective procedure and statistics in the field of such surveys.

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88 *Ibid* at 360.

89 Handbook of Recommended Procedures for Trial of Protracted Cases, adopted by the Judicial Conference of the United States of America, 1960. See the decision of the Full Court in *Arnotts* note 19 *supra* at 359.

90 (1979) 4 TPR 173.

(b) A complete record of:
   (i) The methods by which the universe and sample were selected, and of the techniques employed for selecting and instructing the interviewers, and the experience of those interviewers.
   (ii) Any data underlying the survey, methods of interpretation and conclusions reached.
   (iii) The response to the survey with names and addresses of those interviewed deleted.
   (iv) Any tests applied and the results of any tests applied to determine the extent to which the survey or results of the survey can be trusted.
   (v) The nature of and results of any audit applied in connection with the survey.
   (vi) The method employed in assigning the answers to open ended questions to categories is supplied to the applicant in reasonable time in advance of the hearing.

(c) Such persons as were involved in the conduct of the survey are, if required by the applicant, called by the respondent as witnesses in the proceedings.[91]

The Federal Court has subsequently introduced a Practice Note in relation to survey evidence.[92]

XVI. ADMISSIBILITY OF SURVEY EVIDENCE UNDER THE *EVIDENCE ACT*

It will be apparent from the above that, on common law principles, survey or market research evidence may be original or hearsay evidence. If it was hearsay evidence, the likelihood is that, given the appropriate conditions of reliability, such evidence would be admitted in the Federal Court under Order 33 r 3. It might also have been admitted as an exception to the hearsay rule.[93]

However, survey evidence classified as original evidence would now be admitted under s 62 as an exception to the hearsay rule. Evidence which was hearsay, such as in *Arnott's* would fall into the category of first hand hearsay and be admissible under the provisions of ss 63 and 64, depending upon whether any particular interviewee was available to give evidence. It is more likely that the evidence would be adduced pursuant to s 64 on the basis that calling the witness (or witnesses) would cause undue delay, or would not be reasonably practicable. It

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91 AI Tonking and RJ Alcock (eds), *Australian Trade Practices Reporter*, CCH, vol 2 at [15-135].

92 *Federal Court Practice Notes*, 1994. Practice Note 11 states:
1. Notice should be given in writing by the party seeking to have the survey conducted to the other parties to the proceeding.
2 The notice should give an outline of:
   (a) the purpose of the proposed survey;
   (b) the issue to which it is to be directed;
   (c) the proposed form and methodology;
   (d) the particular questions that will be asked;
   (e) the introductory statements or instructions that will be given to the persons conducting the survey;
   (f) other controls to be used in the interrogation process.
3. The parties should attempt to resolve any disagreement concerning the manner in which the survey is to be conducted and any of the matters mentioned in 2 above.
4. The matter of the survey should be raised with the court at a directions hearing as soon as possible after the steps mentioned above have been taken.

93 See note 70 *supra*; note 82 *supra*.

is unlikely that there would be any argument as to the admissibility of evidence on either of these bases, given the comments by Mahon J in *Custom Glass Boats*.

> ...I do not think it can be right in cases...where evidence of reputation is relevant, and especially in a passing off action where affidavit evidence is not receivable, to compel a party to produce in the courtroom an interminable parade of witnesses to depose individually as to their knowledge and understanding of the [the particular matter subject of the survey].[94]

Reasonable notice of the intention to adduce the hearsay evidence would be required under s 67. Whilst a party could seek to rely on s 68 and object to the tender of the hearsay evidence, I doubt whether that section would be utilised in the case of survey evidence, given the practices which have developed as to the admissibility of such evidence. Further, notwithstanding the provisions of s 67(1) as to notice, it is probable that in the Federal Court, compliance with the court's practice direction would be sufficient for the evidence to be admitted or for the court to make a direction under s 67(4) if it was considered necessary to do so. Alternatively and perhaps more likely, the evidence would be dealt with under Order 33 r 3 or under s 190(3) of the Act. However, the Act should have a significant impact on the ease with which survey evidence can be adduced in jurisdictions which do not have rules of court and practices equivalent to Order 33 r 3 and the Federal Court's practice.

There is, of course, a second aspect of survey evidence - namely, the expert opinion derived from the basic data or responses to the survey questions. The expert evidence would be admissible under s 79. The data upon which it was based would be admissible under s 60, even if it did not comply with the criteria referred to in the Handbook of Recommended Procedures for Trial of Protracted Cases. However, given the importance of survey evidence as well as the strictures with which the authorities indicate it should be attended, it would be a brave party that placed singular reliance upon s 60.

XVII. CONCLUSION

Although the rationalisation of the rules of evidence as they relate to hearsay is to be welcomed, the fundamental changes to the use to which evidence can be put has debateable merit. Such criticisms may of course be grounded in what is familiar, as opposed to what is preferable. However, I believe that the changes implemented by ss 60 and 77 may have the effect of prolonging proceedings. This will occur because it seems inevitable that where those sections operate, an opposing party will make application for the court to reject or limit the use to which such evidence can be put. It would be optimistic to expect such applications to be within short compass. If these applications have any marked degree of success, little will have been achieved in the attempts to reform the hearsay rule and thereby streamline proceedings. Rather, the new era will be one of seriously contested interlocutory applications and applications made during the course of a trial. Only time will tell whether these criticisms are correct.

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94 Note 75 *supra* at 42.