

**Hearsay and all its
friends:
Part 3.2 of the Evidence Act**

Presented by:
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Foley's List

Section 59(1)
Evidence Act 2008

Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation.

Section 65 *Evidence Act 2008*

- (1) *This section applies in a criminal proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.*
- (2) *The hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation –*
 - (a) *was made under a duty to make that representation or to make representations of that kind; or*
 - (b) *was made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication; or*
 - (c) *was made in circumstances that make it highly probable that the representation is reliable; or*
 - (d) *was –*
 - (i) *against the interests of the person who made it at the time it was made; and*
 - (ii) *made in circumstances that make it likely that the representation is reliable.*

Section 65 (Cont.)
Evidence Act 2008

- (3) *The hearsay rule does not apply to evidence of a previous representation made in the course of giving evidence in an Australian or overseas proceeding if, in that proceeding, the accused in the proceeding to which this section is being applied—*
 - (a) *cross-examined the person who made the representation about it; or*
 - (b) *had a reasonable opportunity to cross-examine the person who made the representation about it.*

Dictionary
Part 2, Clause 4

For the purposes of this Act, a person is taken not to be available to give evidence about a fact if-

(a) the person is dead; or

(b) the person is, for any reason other than the application of section 16 (Competence and compellability-judges and jurors), not competent to give the evidence; or

(c) the person is mentally or physically unable to give the evidence and it is not reasonably practicable to overcome that inability; or

[...]

Section 13
Evidence Act 2008

A person is not competent to give evidence about a fact if, for any reason (including a mental, intellectual or physical disability) –

(a) the person does not have the capacity to understand a question about the fact; or

(b) the person does not have the capacity to give an answer that can be understood to a question about the fact – and that incapacity cannot be overcome.

Section 65
Family Violence
Protection Act 2008

(1) *Subject to this Act, in a proceeding for a family violence intervention order the court may inform itself in any way it thinks fit, despite any rules of evidence to the contrary.*

[...]

(3) *The court may refuse to admit, or may limit the use to be made of, evidence if the court is satisfied –*

(a) *it is just and equitable to do so; or*

(b) *the probative value of the evidence is substantially outweighed by the danger that the evidence may be unfairly prejudicial to a party or misleading or confusing.*

Section 66
Family Violence Protection
Act 2008

(1) *The court may admit in a proceeding under this Act evidence given by a person by affidavit or sworn or affirmed statement.*

[...]

(3) *A party to the proceeding may, with the leave of the court, require a person giving evidence by affidavit or by sworn or affirmed statement to attend the hearing of the proceeding to be called as a witness and to be cross-examined.*

Section 66
Evidence Act 2008

(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) The hearsay rule does not apply to evidence of the representation that is given by the person who made the representation or a person who saw, heard or otherwise perceived the representation being made if –

(a) the person who made the representation has been or is to be called to give evidence; and

(b) either –

(i) when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation; or

(ii) the person who made the representation is a victim of an offence to which the proceeding relates and was under the age of 18 years when the representation was made.

Section 69
Evidence Act 2008

- (1) This section applies to a document that –
 - (a) either –
 - (i) is or forms part of the records belonging to or kept by a person, body or organisation in the course of, or for the purposes of, a business; or
 - (ii) at any time was or formed part of such a record; and
 - (b) contains a previous representation made or recorded in the document in the course of, or for the purposes of, the business.

Section 69
Evidence Act 2008

(2) The hearsay rule does not apply to the document (so far as it contains the representation) if the representation was made –

(a) by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact; or

(b) on the basis of information directly or indirectly supplied by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact.

(3) Subsection (2) does not apply if the representation –

(a) was prepared or obtained for the purpose of conducting, or for or in contemplation of or in connection with, an Australian or overseas proceeding; or

(b) was made in connection with an investigation relating or leading to a criminal proceeding.

Lancaster v The Queen
[2014] VSCA 333

1. If parliament had intended to restrict it, they would have said so.
2. “directly or indirectly” has been construed as covering more than second degree of separation.
3. ALRC Report that resulted in the *Evidence Act* affirmed the common law approach to hearsay but provided two categories of exception:
 - a. First hand hearsay – which became Division 2 of Part 3.2
 - b. Second and more remote hearsay – which became Division 3 of Part 3.2
4. As long as it can be concluded the representation was made on by someone with either personal knowledge of the asserted fact, or on the basis of information supplied by someone who had/might reasonably be supposed to have personal knowledge of the asserted fact it is admissible. This is the case even if the actual supplier of the information cannot be identified.

*Addenbrook Pty Ltd v
Duncan (No 5)*
[2014] FCA 625

1. Determine whether the document forms, or at any time formed, part of the record of a business and otherwise satisfied s 69(1);
2. Identify the relevant previous representation contained in the particular document which is sought to be tendered;
3. Identify the fact or facts which it can reasonably be supposed that the maker of the representation intended to assert by making that representation. In order to determine what fact or facts were intended to be asserted, the Court may have regard to the circumstances in which the representation was made;
4. Determine whether that person had the requisite personal knowledge of the fact or facts assert by the representation, or was acting upon the basis of information given to them by someone who had the requisite personal knowledge; and
5. Determine (if relevant to do so and if raised by the objecting party) whether the representation should be excluded under s 69(3), or by reason of the exercise of the Court's discretion under s 135 or s 169 of the Act.

Asserted Fact 1:
During a conversation with Mr F on 28 February 2005, Mr F stated words to the following effect: "Trucking was part of the contract we had with the Grains Board"

MO1401192
28.2.2005

Conference:-
LZ Chris Quennel (by phone)
LRT
Jim Cooper
Trevor Flugge (by phone)

Introduction by J.C →expertise on it

2. List of topics. Handed out to Trevor Flugge
TFlugge@iprimus.com.au
2.00pm Weds. Meeting. DFAT not difficult. Advisable for Jim Cooper to come up
Presenting at lunchtime

3. Knew part of the contract with grain board.
Familiar with the trucking. During time nothing with Iraqis –
Fairly common → all destinations on it. Used to happen –
Common comment. IGB have no money. Operational →
Detail. Not that →cannot u'stand. Agreed a fee to them →
Paid trucking co. on behalf of the IGB. Why would look at it?

Asserted Fact 5:
*Someone stated words
to the following effect:
“Trucking was part of
the contract with the
Grains Board”*



MO 1401192

28.2.2005

Conference:-

Chris Quennel (by phone)

LZ

LRT

Jim Cooper

Trevor Flugge (by phone)

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Lancaster v The Queen
[2014] VSCA 333

- Records were not “business records”
- Expert evidence had no proper basis, so was excluded
 - Defence precluded from XXN under s 342
 - Defence also precluded from XXN about complainants exposure to a convicted sex offender

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