

Hearsay and exceptions

The rule against hearsay

- 59 The hearsay rule—exclusion of hearsay evidence
- (1) 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.
- (2) Such a fact is in this Part referred to as an asserted fact.
- (2A) For the purposes of determining under subsection (1) whether it can reasonably be supposed that the person intended to assert a particular fact by the representation, the court may have regard to the circumstances in which the representation was made.
- 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;
- representation includes— (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;

So, the first question then, is what is the purpose of admission of the previous representation?

- 60 Exception—evidence relevant for a non-hearsay purpose
- (1) 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 an asserted fact.
- (2) This section applies whether or not the person who made the representation had personal knowledge of the asserted fact (within the meaning of section 62(2)).
- (3) However, this section does not apply in a criminal proceeding to evidence of an admission.

- So if a previous representation is admitted for a purpose *other than* to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation, the hearsay rule does not apply
- For instance: a previous representation adduced under the credibility rules (a PIS, or a PCS)
- Or “original evidence,” such as the fact a statement was made, not the assertive quality of the words used, to indicate esoteric knowledge for instance, or its effect

Problem solving

1. What is the previous representation? (who is the out of court declarant, what was the declaration, who is the in court reporter)?
2. What is the purpose of tendering the evidence?
 - To prove the existence of a fact that it can reasonably be supposed that the person intended to assert? If so, hearsay and prima facie inadmissible under s 59
 - For some other purpose? If so, prima facie admissible and the hearsay rule does not apply: s 60
 - Note, not limited to first hand repetition; note also if there are significant risks of misuse, consider s 136
3. If it is hearsay and inadmissible, do any of the exceptions to the rule apply?
 - Ss 63 and 64: first hand hearsay in civil proceedings
 - Ss 65 and 66: first hand hearsay in criminal proceedings
 - If more than first hand repetition, inadmissible
 - If out of court declarant is not competent, inadmissible: s 62
 - S 66A: contemporaneous representations as to intention, state of mind etc
 - S 69: business records
 - S 71: electronic communications
 - S 81: admissions
 - (not an exhaustive list)

Exceptions in civil and criminal proceedings, “first hand”

- Ss 63 and 64 apply to admit certain otherwise inadmissible hearsay representations in civil proceedings
- Ss 65 and 66 apply to admit certain otherwise inadmissible hearsay representations in criminal proceedings
- But they are limited to “first hand” repetition – ie note to self, who is the out of court declarant, who is the in court reporter
- The in court reporter must be the person who saw, heard, or otherwise perceived the previous representation

Section 63 – civil proceedings if maker not available

- (1) This section applies in a civil 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—
 - (a) evidence of the representation that is given by a person who saw, heard or otherwise perceived the representation being made; or
 - (b) a document so far as it contains the representation, or another representation to which it is reasonably necessary to refer in order to understand the representation.

Notes

- For the purposes of the 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 about the fact; or (c) it would be unlawful for the person to give evidence about the fact; or (d) a provision of this Act prohibits the evidence being given; or (e) all reasonable steps have been taken, by the party seeking to prove the person is not available, to find the person or to secure his or her attendance, but without success; or (f) all reasonable steps have been taken, by the party seeking to prove the person is not available, to compel the person to give the evidence, but without success.
- Section 108A allows a party against whom hearsay evidence has been admitted in circumstances where the person who made the previous representation was not called as a witness, to adduce credibility evidence about that person if the evidence could substantially affect the assessment of that person's credibility (s108A).
- There are notice requirements for s63(2). A party is required to provide reasonable notice in writing to each other party of its intention to adduce first hand hearsay evidence under this exception. The notice must set out the provisions and grounds relied upon (s67).
- Note discretion to exclude (s 135) or limit use of evidence (s 136)

Section 64 – civil proceedings if maker available

- (1) This section applies in a civil 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—
 - (a) evidence of the representation that is given by a person who saw, heard or otherwise perceived the representation being made; or
 - (b) a document so far as it contains the representation, or another representation to which it is reasonably necessary to refer in order to understand the representation—
 - if it would cause undue expense or undue delay, or would not be reasonably practicable, to call the person who made the representation to give evidence.
- (3) 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 that is given by—
 - (a) that person; or
 - (b) a person who saw, heard or otherwise perceived the representation being made.
- (4) 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, unless the court gives leave.

Notes

- There are two exceptions to the hearsay rule in this provision, one under s 64(2), and one under s 64(3)
- Section 108A allows a party against whom hearsay evidence has been admitted in circumstances where the person who made the previous representation was not called as a witness, to adduce credibility evidence about that person if the evidence could substantially affect the assessment of that person's credibility (s108A).
- There are notice requirements for s64(2). A party is required to provide reasonable notice in writing to each other party of its intention to adduce first hand hearsay evidence under this exception. The notice must set out the provisions and grounds relied upon (s67).
- Note discretion to exclude (s 135) or limit use of evidence (s 136)

Section 65 – criminal proceedings if maker not available, pt 1

- (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. ...
- (7) Without limiting subsection (2)(d), a representation is taken for the purposes of that subsection to be against the interests of the person who made it if it tends—
 - (a) to damage the person's reputation; or
 - (b) to show that the person has committed an offence for which the person has not been convicted; or
 - (c) to show that the person is liable in an action for damages.

Section 65 – criminal proceedings if maker not available, pt 2

- (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.
- (4) If there is more than one accused in the criminal proceeding, evidence of a previous representation that—
 - (a) is given in an Australian or overseas proceeding; and
 - (b) is admitted into evidence in the criminal proceeding because of subsection (3)—
- cannot be used against a accused who did not cross-examine, and did not have a reasonable opportunity to cross-examine, the person about the representation.
- (5) For the purposes of subsections (3) and (4), an accused is taken to have had a reasonable opportunity to cross-examine a person if the accused was not present at a time when the cross-examination of a person might have been conducted but—
 - (a) could reasonably have been present at that time; and
 - (b) if present could have cross-examined the person.
- (6) Evidence of the making of a representation to which subsection (3) applies may be adduced by producing a transcript, or a recording, of the representation that is authenticated by—
 - (a) the person to whom, or the court or other body to which, the representation was made; or
 - (b) if applicable, the registrar or other proper officer of the court or other body to which the representation was made; or
 - (c) the person or body responsible for producing the transcript or recording.

Section 65 – criminal proceedings if maker not available, pt 3

- (8) The hearsay rule does not apply to—
 - (a) evidence of a previous representation adduced by an accused 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 an accused 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.
- (9) If evidence of a previous representation about a matter has been adduced by an accused and has been admitted, the hearsay rule does not apply to evidence of another representation about the matter that—
 - (a) is adduced by another party; and
 - (b) is given by a person who saw, heard or otherwise perceived the other representation being made.

Notes

- For the purposes of the 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 about the fact; or (c) it would be unlawful for the person to give evidence about the fact; or (d) a provision of this Act prohibits the evidence being given; or (e) all reasonable steps have been taken, by the party seeking to prove the person is not available, to find the person or to secure his or her attendance, but without success; or (f) all reasonable steps have been taken, by the party seeking to prove the person is not available, to compel the person to give the evidence, but without success.
- The rationale for the exception to the hearsay rule contained in s65(2)(b) is not based only upon the necessity to ensure the events in question may easily be recalled. As a whole, the provision is intended to allow evidence that is unlikely to be a fabrication. One condition of this is that the statements have been made spontaneously during ('when') or under the proximate pressure of ('shortly after') the occurrence of the asserted fact (*Williams v R* [2000] FCA 1868).
- As with s65(2)(d), it is necessary to consider the circumstances in which the representation was made. In applying s65(2)(b), however, these circumstances are considered for the purpose of assessing whether the representation is a fabrication. In applying s65(2)(d) the circumstances are considered for the purpose of assessing reliability

Notes

- For the purposes of s65(3), the fact that a defendant had the opportunity to cross-examine the maker of a representation but chose not to do so cannot, of itself, mean that the evidence must be excluded. Such a conclusion would undermine the policy of the Act (Bray (A Pseudonym) v R (2014) 46 VR 623).
- In cases where the evidence of a witness cannot be tested, 'there are mechanisms available to ensure a fair trial, including the capacity of the trial judge to give appropriate and strong directions to the jury regarding the dangers of giving too much weight to untested statements' (Bray (A Pseudonym) v R (2014) 46 VR 623)
- Section 108A allows a party against whom hearsay evidence has been admitted in circumstances where the person who made the previous representation was not called as a witness, to adduce credibility evidence about that person if the evidence could substantially affect the assessment of that person's credibility (s108A).
- There are notice requirements for s65(2). A party is required to provide reasonable notice in writing to each other party of its intention to adduce first hand hearsay evidence under this exception. The notice must set out the provisions and grounds relied upon (s67).
- Note discretion to exclude (s 135) or limit use of evidence (s 136) or requirement to exclude (s 137)

Section 66 – criminal proceedings if maker available

- (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.
- (2A) In determining whether the occurrence of the asserted fact was fresh in the memory of a person, the court may take into account all matters that it considers are relevant to the question, including—
 - (a) the nature of the event concerned; and
 - (b) the age and health of the person; and
 - (c) the period of time between the occurrence of the asserted fact and the making of 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.
- (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.

Notes

- This is the basis of admissibility and reception of complaint evidence, such as in the case of a complainant in a sexual assault case
- Section 66(2A) was inserted in response to the decision of the High Court of Australia in *Graham v R* (1998) 195 CLR 606. In that case, 'fresh in the memory' was interpreted temporally to mean 'recent' or 'immediate', being hours or days.
- Section 66(2A) now broadens this application. While the time between the occurrence of the asserted fact and the making of the representation is a relevant consideration, the phrase 'fresh in the mind' does not impose a 'determinative temporal limitation' (*ISJ v R* (2012) 38 VR 23).
- There are notice requirements for s66(2). A party is required to provide reasonable notice in writing to each other party of its intention to adduce first hand hearsay evidence under this exception. The notice must set out the provisions and grounds relied upon (s67).
- Note discretion to exclude (s 135), or limit use of evidence (s 136), or requirement to exclude (s 137)

s 66A – Exception: contemporaneous statements about a person's health etc.

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

- Notes:
- Evidence must be relevant
- Subject to exclusion under ss 135, 136 and 137

s 69 – Exception: business records

- (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.
- (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.
- (4) If—
 - (a) the occurrence of an event of a particular kind is in question; and
 - (b) in the course of a business, a system has been followed of making and keeping a record of the occurrence of all events of that kind—
- the hearsay rule does not apply to evidence that tends to prove that there is no record kept, in accordance with that system, of the occurrence of the event.
- (5) For the purposes of this section, a person is taken to have had personal knowledge of a fact if the person's knowledge of the fact was or might reasonably be supposed to have been based on what the person saw, heard or otherwise perceived (other than a previous representation made by a person about the fact).

Section 71 – Exception: electronic communications

- The hearsay rule does not apply to a representation contained in a document recording an electronic communication so far as the representation is a representation as to—
 - (a) the identity of the person from whom or on whose behalf the communication was sent; or
 - (b) the date on which or the time at which the communication was sent; or
 - (c) the destination of the communication or the identity of the person to whom the communication was addressed.

Section 81 – Hearsay and opinion rules: exceptions for admissions and related representations

- (1) The hearsay rule and the opinion rule do not apply to evidence of an admission.
- (2) The hearsay rule and the opinion rule do not apply to evidence of a previous representation—
 - (a) that was made in relation to an admission at the time the admission was made, or shortly before or after that time; and
 - (b) to which it is reasonably necessary to refer in order to understand the admission.